IN THE SUPREME COURT OF INDIA

(CIVIL ORIGINAL JURISDICTION)

WRIT PETITION(CIVIL) NO. 494 of 2012, 797 of 2016 & 342 of 2016

K.S. Puttaswamy(Retd) & Anr.	...	Petitioners
Versus		
Union of India & Others.	...	Respondents

VOLUME -III

COMPILATION
SHRI RAKESH DWIVEDI
SENIOR ADVOCATE
FOR STATE OF GUJARAT

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1.

INALIENABLE AND NATURAL RIGHTS- VIEWS OF JUDGES IN KESAVANAD BHARTI VS. STATE OF KERALA (1973) 4 SCC 225 :

Khanna, J. : (Pr 1456,1457, 1467,1469,1470)

1456. We may now deal with the concept of natural rights. Such rights are stated to be linked with cherished values like liberty, equality and democracy. It is urged that such rights are inalienable and cannot be affected by an amendment of the Constitution. I agree with the learned counsel for the petitioners that some of the natural rights embody within themselves cherished values and represent certain ideals for which men have striven through the ages. The natural rights have, however, been treated to be not of absolute character but such as are subject to certain limitations. Man being a social being, the exercise of his rights has been governed by his obligations to the fellow beings and the society, and as such the rights of the individual have been subordinated to the general weal. No one has been allowed to so exercise his rights as to impinge upon the rights of others. Although different streams of thought still persist, the later writers have generally taken the view that natural rights have no proper place outside the Constitution and the laws of the state. It is up to the State to incorporate natural rights, or such of them as are deemed essential, and subject to such limitations as are considered appropriate, in the Constitution or the laws made by it. But independently of the Constitution and the laws of the state, natural rights can have no legal sanction and cannot be enforced. The courts look to the provisions of the Constitution and the statutory law to determine the rights of individuals. The binding force of constitutional and statutory provisions cannot be taken away nor can their amplitude and width be restricted by invoking the concept of natural rights. Further, as natural rights have no place in order to be legally enforceable outside the provisions of the Constitution and the statute, and have to be granted by the constitutional or statutory provisions, and to the extent and subject to such limitations as are contained in those provisions, those rights, having been once incorporated in the Constitution or the statute, can be abridged or taken away by amendment of the Constitution or the statute. The rights, as such, cannot be deemed to be supreme or of superior validity to the enactments made by the state, and not subject to the amendatory process.

1457. It may be emphasised in the above context that those who refuse to subscribe to the theory of enforceability of natural rights do not deny that there are certain essential values in life, nor do they deny that there are certain requirements necessary for a civilized existence. It is also not denied by them that there are certain ideals which have inspired mankind through the corridor of centuries and that there are certain objectives and desiderata for which men

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have struggled and made sacrifices. They are also conscious of the noble impulses yearning for a better order of things, of longings natural in most human hearts, to attain a State free from imperfections where higher values prevail and are accepted: Those who do not subscribe to the said theory regarding natural rights, however, do maintain that rights in order to be justiciable and enforceable must form part of the law or the Constitution, that rights to be effective must receive their sanction and sustenance from the law of the land and that rights which have not been codified or otherwise made a part of the law, cannot be enforced in courts of law nor can those rights override or restrict the scope of the plain-language of the statute or the Constitution.

1467. Our attention has been invited to the declaration of human rights in the Charter of the United Nations. It is pointed out that there is similarity between the fundamental rights mentioned in Part III of the Constitution and the human rights in the Charter. According to Article 56 of the Charter, all members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55. Article 55, inter alia, provides that the United Nations shall promote universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. It is submitted on behalf of the petitioners that if the power of amendment of the Constitution under Article 368 were to include the power to abridge or take away fundamental rights, the amendment might well have the effect of curtailing or doing away with some of the human rights mentioned in the United Nations Charter. In this respect I am of the view that the width and scope of the power of amendment of that Constitution would depend upon the provisions of the Constitution. If the provisions of the Constitution are clear and unambiguous and contain no limitations on the power of amendment, the court would not be justified in grafting limitations on the power of amendment because of an apprehension that the amendment might impinge upon human rights contained in the United Nations Charter. It is only in cases of doubt or ambiguity that the courts would interpret a statute as not to make it inconsistent with the comity of nations or established rules of international law, but if the language of the statute is clear, it must be followed notwithstanding the conflict between municipal law and international law which results. (*see* Maxwell on *The Interpretation of Statutes*, 12th Edn, p. 183). It has been observed on p. 185:

> "But if a statute is clearly inconsistent with international law or the comity of nations, it must be so construed, whatever the effect of such a construction may be. There is, for instance, no doubt that a right conferred on an individual by a treaty made with the Crown may be taken from him by act of the legislature."

The above observations apply with greater force to a constitutional provision as such provisions are of a paramount nature. It has already been mentioned above that the provisions of our Constitution regarding the power of making amendment are clear and unambigious and contain no limitation on that power. I, therefore, am not prepared to accede to the contention that a limitation on the power of amendment should be read because of the declaration of Human Rights in the UN Charter.

1469. I am also of the view that the power to amend the provisions of the Constitution relating to the fundamental rights cannot be denied by describing the fundamental rights as natural rights or human rights. The basic dignity of man does not depend upon the codification of the fundamental rights nor is such codification a prerequisite for a dignified way of living. There was no constitutional provision for fundamental rights before January 26, 1950 and yet can it be said that there did not exist conditions for dignified way of living for Indians during the period between August 15, 1947 and January 26, 1950. The plea that provisions of the Constitution, including those of Part III, should be given retrospective effect has been rejected by this Court. Article 19 which makes provision for fundamental rights, is not applicable to persons who are not citizens of India. Can it, in view of that, be said that the non-citizens cannot while staying in India lead a dignified life? It would, in my opinion, be not a correct approach to say that amendment of the Constitution relating to abridgement or taking away of the fundamental rights would have the effect of denuding human beings of basic dignity and would result in the extinguishment of essential values of life.

1470. It may be mentioned that the provisions of Article 19 show that the framers of the Constitution never intended to treat fundamental rights to be absolute. The fact that reasonable restrictions were carved in those rights clearly negatives the concept of absolute nature of those rights. There is also no absolute standard to determine as to what constitutes a fundamental right. The basis of classification varies from country to country. What is fundamental right in some countries is not so in other countries. On account of the difference between the fundamental rights adopted in one country and those adopted in another country, difficulty was experienced by our Constitution-makers in selecting provisions for inclusion in the chapter on fundamental rights (see in this connection *Constitutional Precedents, III Series on Fundamental Rights* p. 25 published by the Constituent Assembly of India).

Matthew ,J.: (Pr 1681-1683) :

1681. That all natural rights are liable to be limited or even taken away for common good is itself a principle recognized by all writers on natural law. "However, even though man's natural rights are commonly termed absolute and inviolable, they are limited by the requirements of the universal Order to which they are subordinated. Specifically, the natural rights of man are limited intrinsically by the end for which he has received them as well as extrinsically by the equal rights of other men, by his duties towards others".g60 And when the Parliament restricts or takes away the exercise of the Fundamental Rights by military personnel or the police charged with the duty of maintaining the peace, that does not mean that there are no natural rights, or, that by and large, the Fundamental Rights are not a recognition of the natural rights. It only shows that Fundamental Rights like natural rights are liable to be limited for the common good of the society. John Locke himself did not understand that natural rights were absolute and nowhere did he say so. In other words, because Parliament 869can restrict the exercise of or even take away the Fundamental Rights of the military personnel or the police charged with the duty of maintaining peace by law, it does not follow that Fundamental Rights, by and large, are not a recognition of the basic human rights or that those rights are not liable to be limited by positive law for common good. Natural law cannot supplant positive law; positive law must provide the practical solution in the choice of one measure rather than another in a given situation. Sir Frederick Pollock said that natural justice has no means of fixing any rule to terms denied in number or measure, nor of choosing one practical solution out of two or more which are in themselves equally plausible. Positive law, whether enacted or customary, must come to our aid in such matters. It would be no great feat for natural reason to tell us that a rule of the road is desirable; but it could never have told us whether to drive to the right hand or to the left, and in fact custom has settled this differently in different countries, and even, in some parts of Europe, in different provinces of one State.

1682. Nor am I impressed by the argument that because non-citizens are not granted all the Fundamental Rights, these rights, by and large, are not a recognition of the human or natural rights. The fact that Constitution does not recognize them or enforce them as Fundamental Rights for non-citizens is not an argument against the existence of these rights. It only shows that our Constitution has chosen to withhold recognition of these rights as fundamental rights for them for reasons of State policy. The argument that Fundamental Rights can be suspended in an emergency and, therefore, they do not stem from natural rights suffers from the same fallacy, namely the natural rights have

no limits or are available as immutable attributes of human person without regard to the requirement of the social order or the common good.

1683. Mr Palkhivala contended that there are many human rights which are strictly inalienable since they are grounded on the very nature of man which no man can part with or lose. Although this may be correct in a general sense, this does not mean that these rights are free from any limitation. Every law, and particularly, natural law, is based on the fundamental postulate of Aristotle that man is a political animal and that his nature demands life in society. As no human being is an island, and can exist by himself, no human right, which has no intrinsic relation to the common good of the society can exist. Some of the rights like the right to life and to the pursuit of happiness are of such a nature that the common good would be jeopardised if the body politic would take away the possession that men naturally have of them without justifying reason. They are, to a certain extent, inalienable. Others like the right of free speech or of association are of such a nature that the common good would be jeopardised if the body politic could not restrict or even take away both the possession and the exercise of them. They cannot be said to be inalienable. And, even absolutely inalienable rights are liable to limitation both as regards their possession and as regards their exercise. They are subject to conditions and limitations dictated in each case by justice, or by considerations of the safety of the realm or the common good of the society. No society has ever admitted that in a just war it could not sacrifice individual welfare for its own existence. And as Holmes said, if conscripts are necessary for its army, it seizes them and marches them, with bayonets in their rear to death. If a criminal can be condemned to die, it is because by his crime he has deprived himself of the possibility of justly asserting this right. He has morally cut himself off from the human community as regard this right.

Chandrachud, J. : (Pr. 2083,2084)

2083. It is difficult to accept the argument that inherent limitations should be read into the amending power on the ground that Fundamental Rights are natural rights which inhere in every man. There is intrinsic evidence in Part III of the Constitution to show that the theory of natural rights was not recognised by our Constitution-makers. Article 13(2) speaks of rights "conferred" by Part III and enjoins the States not to make laws inconsistent therewith. Article 32 of the Constitution says that the right to move the Supreme Court for the enforcement of rights "conferred" by Part III is guaranteed. Before the Fundamental Rights were thus conferred by the Constitution, there is no tangible evidence that these rights belonged to the Indian people. Article 19 of the Constitution restricts the

grant of the seven freedoms to the citizens of India. Non-citizens were denied those rights because the conferment of some of the rights on the Indian citizens was not in recognition of the pre-existing natural rights. Article 33 confers upon Parliament the power to determine to what extent the rights conferred by Part III should be restricted or abrogated in their application to the members of the Armed Forces. Article 359(1) empowers the President to suspend the rights "conferred" by Part III during the proclamation of an emergency. Articles 25 and 26 by their opening words show that the right to freedom of religion is not a natural right but is subject to the paramount interest of society and that there is no part of that right, however important, which cannot and in many cases has not been regulated in civilised societies. Denial to a section to the community, the right of entry to a place of worship, may be a part of religion but such denials, it is well-known, have been abrogated by the Constitution, per Venkatarama Aiyar, J.; (see also *Bourne* v. *Keane* per Lord Birkenhead, L. C). Thus, in India, citizens and non-citizens possess and are emitted to exercise certain rights of high significance for the sole reason that they are conferred upon them by the Constitution.

2084. The "natural right" theory stands, by and large, repudiated today. The notion that societies and Governments find their sanction on a supposed contract between independent individuals and that such a contract is the sole source of political obligation is now regarded as untenable. Calhoun and his followers have discarded this doctrine, while theorists like Story have modified it extensively. The belief is now widely held that natural rights have no other than political value. According to Burgess, "there never was, and there never can be any liberty upon this earth among human beings, outside of State organisation". According to Willoughby, natural rights do not even have a moral value in the supposed "state of nature"; they would really be equivalent to force and hence have no political significance. Thus, Natural Right thinkers had once "discovered the lost title-deeds of the human race" but it would appear that the deeds are lost once over again, perhaps never to be resurrected.

Ray, J.: (Pr. 939)

939. On the one hand there is a school of extreme natural law philosopher's who claim that a natural order establishes that private capitalism is good and socialism is bad. On the other hand, the more extreme versions of totalitarian legal philosophy deny the basic value of the human personality as such. Outside these extremes, there is a far greater degree of common aspirations. The basic autonomy and dignity of human personality is the moral foundation of the teaching of modern natural law philosophers, like Maritain. It is in this

context that our fundamental rights and directive principles are to be read as having in the ultimate analysis a common good. The directive principles do not constitute a set of subsidiary principles to fundamental rights of individuals. The directive principles embody the set of social principles to shape fundamental rights to grant a freer scope to the large scale welfare activities of the State. Therefore, it will be wrong to equate fundamental rights as natural, inalienable, primordial rights which are beyond the reach of the amendment of the Constitution. It is in this context that this Court in *Basheshar Nath* v. *CIT* said that the doctrine of natural rights is nothing but a foundation of shifting sand.

Palekar,J. : (Pr.1277-1278)

1277. The further argument that fundamental rights are inalienable natural rights and, therefore, unamendable so as to abridge or take them away does not stand close scrutiny. Articles 13 and 32 show that they are rights which the people have "conferred" upon themselves. A good many of them are not natural rights at all. Abolition of untouchability (Article 17); abolition of titles (Article 18); protection against double jeopardy [Article 20(2)]; protection of children against employment in factories (Article 24); freedom as to attendance at religious instruction or religious worship in certain educational institutions (Article 28) are not natural rights. Nor are all the fundamental rights conceded to all as human beings. The several freedoms in Article 19 are conferred only on citizens and not non-citizens. Even the rights conferred are not in absolute terms. They are hedged in and restricted in the interest of the general public, public order, public morality, security of the State and the like which shows that social and political considerations are more important in our organized society. Personal liberty is cut down by provision for preventive detention which, having regard to the conditions prevailing even in peace time, is permitted. Not a few members of the Constituent Assembly resented the limitations on freedoms on the ground that what was conferred was merely a husk. Prior to the Constitution no such inherent inalienability was ascribed by law to these rights, because they could be taken away by law.

1278. The so-called natural rights which were discovered by philosophers centuries ago as safeguards against contemporary political and social oppression have in course of time, like the principle of *laissez faire* in the economic sphere, lost their utility as such in the fast changing world and are recognized in modern political constitutions only to the extent that organized society is able to respect them. That is why the Constitution has specifically said that the rights are conferred by the people on themselves and are thus, a gift of the Constitution. Even in the most advanced and 697 orderly democratic

societies in the world in which political equality is to a large extent achieved, the content of liberty is more and more recognized to be the product of social and economic justice without which all freedoms become meaningless. To claim that there is equal opportunity in a society which encourages or permits great disparties in wealth and other means of social and political advancement is to run in the face of facts of life. Freedoms are not intended only for the fortunate few. They should become a reality for those whose entire time is now consumed in finding means to keep alive. The core philosophy of the Constitution lies in social, economic and political justice — one of the principal objectives of our Constitution as stated in the preamble and Article 38, and any move on the part of the society or its government made in the direction of such justice would inevitably impinge upon the "sanctity" attached to private property and the fundamental right to hold it. The directive principles of state policy, which our Constitution commands should be fundamental in the governance of the country, require the state to direct its policy towards securing to the citizens adequate means of livelihood. To that and the ownership and control of the material resources of the community may be distributed to serve the common good, and care has to be taken that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. See: Articles 37 to 39. This mandate is as important for the State as to maintain individual freedoms and, therefore, in the final analysis it is always a continuous endeavour of a State, having the common good of the people at heart, so to harmonize the directive principles and the fundamental rights that, so far as property rights are concerned, the unlimited freedom to hold it would have to undergo an adjustment to the demands of the State policy decided by the directive principles. Deprivation of property in one form or other and even expropriation would, in the eyes of many, stand justified in a democratic organization as long as those who are deprived do not earn it by their own effort or otherwise fail to make adequate return to the society in which they live. The attribute of "sacredness" of property vanishes in an egalitarian society. And once this is accepted and deprivation and expropriation are recognized as inevitable in the interest of a better social organization in which the reality of liberty and freedom can be more widely achieved, the claim made on behalf of property that if is an immutable and inalienable natural right loses its force. One cannot lift parts of the Constitution above it by ascribing ultra-constitutional virtues to them. The Constitution is a legal document and if it says that the whole of it is amendable, we cannot place the fundamental rights out of bounds of the amending power. It is essential to note in the present case that though the plea was generally made on behalf of all fundamental rights, the fundamental right with which we are concerned, principally, is the right to property. It will be sufficient to note here that in modern democracies the tendency is not to recognize right to property as an inalienable natural right. We

can do no better than quote here a few passages from W. Friedmann's *Legal Theory*, Fifth Edn., 1967:

> "The official doctrine of the modern Roman Catholic Church, from Rerum Novarum (1891) onwards, and of most neo-scholastic philosophers, is that the right of private property is a dictate of natural law. But St. Thomas Aquinas and Suarez strongly deny the natural law character of the right of private property and regard it (rightly as I believe) merely as a matter of social utility.p. 357.
>
> When faced with the solution of concrete legal problems, we find time and again that natural law formulas may disguise but not solve the conflict between values, which is a problem of constant and painful adjustment between competing interest, purposes and policies. How to resolve this conflict is a matter of ethical or political evaluation which finds expression in current legislative policies and to some extent in the impact of changing ideas on judicial interpretations. And, of course, we all have to make up our minds as responsible human beings and citizens what stand we will take, for example in the tension between state security and individual freedom. The danger is that by giving our faith the halo of natural law we may claim for it an absolute character from which it is only too easy to step to the condemnation or suppression of any different faith". (pp. 357-358).
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> The time is past when Western beliefs can be regarded as a measure of all things. Nor will the natural law hypothesis aid much in the solution of the agonising problem of the limits of obedience to positive law. (p. 359).
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> The main forces in the development of modern democratic thought have been the liberal idea of individual rights protecting the individual, and the democratic idea proper, proclaiming equality of rights and popular sovereignty. The gradual extension of the idea of equality from the political to the social and economic field has added the problems of social security and economic planning. The implementation and harmonisation of these principles has been and continues to be the main problem of democracy. (p. 398).
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> But democratic communities have universally, though with varying speed and intensity, accepted the principle of social obligation as limiting individual right. (p. 399).

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But modern democracy, by the same process which has led to the increasing modification of individual rights by social duties towards neighbours and community, has every where had to temper freedom of property with social responsibilities attached to property. The limitations on property are of many different kinds. The State's right of taxation, its police power and the power of expropriation — subject to fair compensation — are examples of public restrictions on freedom of property which are now universally recognized and used. Another kind of interference touches the freedom of use of property, through the growing number of social obligations attached by law to the use of industrial property, or contracts of employment. (p. 405).

The degree of public control over private property depends largely on the stringency of economic conditions. Increasing prosperity and availability of consumer goods has led to a drastic reduction of economic controls, and a trend away from socialisation in Europe. But in the struggling new democracies such as India, poor in capital and developed-resources, and jealous of their newly-won sovereignty, public planning and control over vital resources are regarded as essential. The Constitution of the West German Republic of 1949, which reflects a blend of American, British and post-war German ideas on the economic aspects of democracy, lays down that land, minerals and means of production may be socialised or be subjected to other forms of public control by a statute which also regulates compensation. Such compensation must balance the interests of the community and those of the individual and leave recourse to law open to the person affected. This still permits wide divergencies of political and economic philosophy, but in the recognition of social control over property, including socialisation as a legitimate though not a necessary measure, it reflects the modern evolution of democratic ideas. Between the capitalistic democracy of the United States and social democracy of India there are many shades and variations. But modern democracy looks upon the right of property as one conditioned by social responsibility by the needs of society, by the "balancing of interests" which looms so large in modern jurisprudence, and not as preordained and untouchable private right. (p. 406).

Beg, J. : (Pr.1845-1846)

1845. Mr Palkhivala then made an impassioned appeal to the theories of natural law and natural rights sought to be embodied in present day international laws as well as constitutional laws. It is not necessary for me to

deal at length with the political philosophy or the juristic implications of various and convicting natural law theories, such as those of *Spinoza, Hobbes, Locke or Rousseau*, discussed by T.H. Green in his *Principles of Political Obligation* I also do not find it necessary to embark on an academic discussion of ancient and medieval theories of natural law. I will, however, quote a passage from *Fridmann* on *Legal Theory* (5th Edn., pp. 95-96), where the position, place, and uses of "natural law" theories are thus summarised:

> "The history of natural law is a tale of the search of mankind for absolute justice and of its failure. Again and again, in the course of the last 2500 years, the idea of natural law has appeared, in some form or other, as an expression of the search for an ideal higher than positive law after having been rejected and derided in the interval. With changing social and political conditions the notions about natural law have changed. The only thing that has remained constant is the appeal to something higher than positive law. The object of that appeal has been as often the justification of existing authority as a revolt against it.
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> Natural law has fulfilled many functions. It has been the principal instrument in the transformation of the old civil law of the Romans into a broad and cosmopolitan system; it has been a weapon used by both sides in the fight between the medieval Church and the German emperors; in its name the validity of international law has been asserted, and the appeal for freedom of the individual against absolutism launched. Again it was by appeal to principles of natural law that American judges, professing to interpret the Constitution, resisted the attempt of State legislation to modify and restrict the unfettered economic freedom of the individual.
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> It would be simple to dismiss the whole idea of natural law as a hypocritical disguise for concrete political aspirations and no doubt it has sometimes exercised little more than this function. But there is infinitely more in it. Natural law has been the chief though not the only way to formulate ideals and aspirations of various peoples and generations with reference to the principal moving forces of the time. When the social structure itself becomes rigid and absolute, as at the time of Schoolmen, the ideal too will take a static and absolute content. At other times, as with most modern natural law theories, natural law ideals become relative or merely formal, expressing little more than the yearning of a generation which is dissatisfied with itself and the world, which seeks

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something higher, but is conscious of the relativity of values. It is as easy to deride natural law as it is to deride the futility of mankind's social and political life in general, in its unceasing but hitherto vain search for a way out of the injustice and imperfection for which Western civilisation has found no other solution but to move from one extreme to another.

The appeal to some absolute ideal finds a response in men, particularly at a time of disillusionment, and doubt, and in the times of simmering revolt. Therefore natural law theories, far from being theoretical speculations, have often heralded powerful political and legal developments."

1846. I am not prepared to use any natural law theory for putting a construction on Article 368 of the Constitution which will defeat, its plain meaning as well as the objects of the Constitution as stated in the Preamble and the Directive Principles of State Policy. I do not know of any case in which this has been done. Even in the *Golak Nath case*, Subba Rao, C.J., relied on a natural law theory to strengthen his views really based on an application of the supposed express bar contained in Article 13(2).

Dwivedi, J. : (Pr. 1859, 1936-1938 (agrees with Ray J):

This extract is taken from *Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225*, at page 921 :

1859-A. Ideas which failed to win the minds of Englishmen in the Stuart period and died in discomfiture are seeking transmigration into the Constitution of India now. Perceive some resemblances.

Ideas during the Stuart Period	*Arguments of Sri Palkhiwala*
1. "Acts of Parliament may take away flowers and ornaments of the Crown, but not the crown itself....	1. By virtue of Article 368 Parliament cannot so amend the Constitution as to take away or abridge the essential features of the Constitution.
2. The Parliament cannot deliver over the free people of England to a foreign government, or to laws imposed by foreigners...	2. Parliament cannot so amend the Constitution as to make the Republic of India a satellite of a foreign country.

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3. The Parliament cannot deprive the free people of England of their innate rights of electing knights, citizens and burgesses for Parliament. In these things of the nature of these tending to the fundamental rights and laws of the people the Parliament cannot nor ought not any way to violate the people or nation.	3. Parliament cannot so amend the Constitution as to damage or destroy the core of the fundamental rights in Part III of the Constitution.
4. Properties are the foundation of Constitution, and not the Constitutions of property. Or if so be there were no Constitution, yet Law of Nature does give a principle for every man to have a property of what he has or may have which is not another man's.	4. The right to property is a human right and is necessary for the enjoyment of every other right. It is based on Natural Law. It cannot be taken away or abridged by an amendment of the Constitution.
5. How any representative, that has not only a mere trust to preserve fundamental, but that is a representative that makes laws, by virtue of this fundamental law viz. that the people have a power in legislation ... can have a right to remove or destroy that fundamental? The fundamental makes the people free : this free people makes a representative; can this creature unqualify the creator?	5. Parliament is a creature of the Constitution. It cannot rise above its creator i.e. the Constitution. So it cannot damage or destroy the core of the Fundamental rights.
6. When an act of Parliament is against common right or person, the Common Law will control it and adjudge such act to be void.	6. Amending power in Article 368 is limited by the principles of Natural Law and an amendment in violation of these principles will be void.
7. Cases which concern the life, or inheritance, or goods or fortunes of subjects ... are not to be decided by natural reason, but by artificial reason and judgment of law, which law is an act which requires long study and experience before that a man can attain to the cognizance of it.	7. The inherent and implied limitations to the amending power in Article 368 will be determined by judges possessing a trained and perceptive judicial mind.

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1936. Sri Palkhivala has invoked natural law as the higher law conditioning the constituent power in Article 368. Natural law has been a sort of religion with many political and constitutional thinkers. But it has never believed in a single Godhead, It has a perpetually growing pantheon, look at the pantheon and you will observe there: "State of Nature", "Nature of Man", "Reason", "God", "Equality", "Liberty", "Property", "Laissez Faire", "sovereignty", "Democracy", "Civilized Decency", "Fundamental Conceptions of Justice" and even "War".

1937. The religion of Natural Law has its illustrious Priestly Heads such as Chrysippus, Cicero, Seneca, St. Thomas, Acquinas, Grotius, Hobbes, Locke, Paine, Hamilton, Jefferson and Trietschke. The pantheon is not a heaven of peace. Its gods are locked in constant internecine conflict.

1938. Natural Law has been a highly subjective and fighting faith. Its-bewildering variety of mutually warring gods has provoked Kelson to remark: "(O)utstanding representatives of the natural law doctrine have proclaimed in the name of Justice or Natural Law principles which not only contradict one another, but are in direct opposition to many positive legal orders. There is no positive law that is not in conflict with one or the other of these principles; and it is not possible to ascertain which of them has a better claim to be recognised than any other. All these principles represent the highly subjective value judgments of their various authors about what they consider to be just or natural.

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ANNEXURE –B :

DUE PROCESS NOT APPLICABLE

1. ***Municipal Committee v. State of Punjab, (1969) 1 SCC 475*, (3JJ)**

But the rule that an Act of a competent Legislature may be "struck down" by the Courts on the ground of vagueness is alien to our Constitutional system. The Legislature of the State of Punjab was competent to enact legislation in respect of "fairs', *vide* Entry 28 of List II of the Seventh Schedule to the Constitution. A law may be declared invalid by the superior Courts in India if the Legislature has no power to enact the law or that the law violates any of the fundamental rights guaranteed in Part III of the Constitution or is inconsistent with any constitutional provision, but not on the ground that it is vague. It is true that in *Claude C, Coppally* v. *General Construction Company*, it was held by the Supreme Court of the United States of America that:

> "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

But the rule enunciated by the American courts has no application under our Constitutional set up. The rule is regarded as an essential of the "due process clauses" incorporated in the American Constitution by the 5th and the 14th Amendments. The Courts in India have no authority to declare a statute invalid on the ground that it violates the "due process of law". Under our Constitution, the test of due process of law cannot be applied to statutes enacted by Parliament or the State Legislatures. This Court has definitely ruled that the doctrine of due process of law has no place in our Constitutional system. *A.K. Gopalan* v. *State of Madras*. Kania, C.J., observed (at p. 120):

> "There is considerable authority for the statement that the Courts are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words ... it is only in express constitutional provisions limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for the authority of Courts of Justice to declare void any legislative enactment."

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The order made by the High Court in *Mohinder Singh Sawhney's case,* striking down the Act was passed on the assumption that the validity of the Act was liable to be adjudged by the test of "due process of law". The Court was plainly in error in so assuming. We are also unable to hold that the previous decision operates as res judicata even in favour of the petitioners in whose petitions an order was made by the High Court in the first group of petitions. The effect of that decision was only that the Act was in law, nonexistent, so long as there was no definition of the expression "cattle fair" in the Act. That defect has been remedied by the Punjab Act 18 of 1968.

2. *Collector of Customs v. Nathella Sampathu Chetty, (1962) 3 SCR 786 : AIR 1962 SC 316 : (1962) 1 Cri LJ 364*

Learned counsel relied particularly on the decisions in *Bailey* v. *State of Alabama* and *Manley* v. *State of Georgia*. The first of these was concerned with the validity of a law of the State of Alabama by which refusal, without just cause, to perform the labour agreed to be performed in a written contract of employment under which the employee had obtained money which he did not refund was made prima facie evidence of an intent to commit a fraud. The Supreme Court held the law invalid. Two grounds were urged in support of the argument that the legislation was unconstitutional. The first was that it was in violation of the 13th amendment against "involuntary servitude except as punishment for crime", the other that the law was in violation of the "due process" clause contained in the 14th amendment. The Supreme Court upheld both these contentions, but what is relevant to the present context and on which learned counsel relied was the reason assigned for holding that the rule of evidence enacted by the impugned statute violated the requirement of "due process". Reliance was placed for the State before the Supreme Court on the fact that the presumption raised was not conclusive but was open to rebuttal by the accused, but this was held hot to be of avail, because according to the rule of evidence enforced by the Courts of Alabama, the accused, for the purpose of rebutting the statutory presumption, was not allowed to testify as to his uncommunicated motives, purposes or intentions, so that virtually it amounted to a conclusive presumption against the accused. The statute whose validity was attacked in the second American decision referred to was one declaring that every insolvency of a bank shall be deemed fraudulent and subjected the directors to imprisonment unless they repelled the presumption of fraud by showing that the affairs of the bank had been fairly and legally administered. Head Note 1 to this case sums up the American law on the subject of the constitutional validity with reference to

the "due process" clause, of laws of evidence creating presumptions. It runs:

24. In regard to the American decisions of which only a few were cited, including those just now set out, the principle underlying them is to be found summarized in Rottschaefer's *Constitutional Law* at p. 835, where the learned author says:

> "The power of a legislature to prescribe the rules of evidence is universally recognized, but it is equally well established that due process limits it in this matter. It may establish rebuttable presumptions only if there is a rational connection between what is proved and what is permitted to be inferred therefrom."

It would be seen that the decisions proceed on the application of the "due process" clause of the American Constitution. Though the tests of "reasonableness" laid down by clauses (2) to (6) of Article 19 might in great part coincide with that for judging of "due process", it must not be assumed that these are identical, for it has to be borne in mind that the Constitution framers deliberately avoided in this context the use of the expression "due process" with its comprehensiveness, flexibility and attendant vagueness, in favour of a somewhat more definite word "reasonable", and caution has, therefore, to be exercised before the literal application of American decisions. In making these observations we are merely repeating a warning found in the judgment of this Court in *A.S. Krishna* v. *State of Madras*[9] where Venkatarama Ayyar, J. speaking with reference to the point now under discussion after quoting the passage already extracted from Rottschaefer's treatise stated:

> "The law would thus appear to be based on the due process clause, and it is extremely doubtful whether it can have application under our Constitution.

3. ***Chhotabhai Jethabhai Patel & Co. v. Union of India, 1962 Supp (2) SCR 1 : AIR 1962 SC 1006***

39. It would thus be seen that even under the constitution of the United States of **America the unconstitutionality of a retrospective** tax is rested on what has been termed "**the vague contours of the 5th Amendment". Whereas under the Indian Constitution the grounds on which infraction of the rights to property is to be tested not by the flexible rule of "due process" but on the more precise criteria set out in Article 19(5),** mere retrospectivity in the imposition of the tax cannot per se render the Law unconstitutional on the ground of its infringing the right to hold property under Article 19(1)(*f*) or depriving the

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person of property under Article 31(1). If on the one hand, the tax enactment in question were beyond the legislative competence of the Union or a State necessarily different considerations arise. Such unauthorised imposition would undoubtedly not be a reasonable restriction on the right to hold property besides being an unreasonable restraint on the carrying on of business, if the tax in question is one which is laid on a person in respect of his business activity.

4. ***K.K. Kochuni v. States of Madras and Kerala, (1960) 3 SCR 887 : AIR 1960 SC 1080*** (Per Sarkar J)

80. It seems to us that this observation of the Federal Court which no doubt was made with reference to the Government of India Act, 1935 applies with equal force to the position obtaining under our Constitution. It has been held by this Court that there is no scope under our Constitution for the application of the American concept of "due process of law". The American cases cited in support of the contention that a legislation cannot override judicial decisions therefore afford no assistance in our country. Article 31-B itself provides that it would apply notwithstanding any judgment, decree or order of any court to the contrary and it had been enacted by an Act passed by the Parliament. There have been many Acts passed since the Constitution came into force which contained similar provisions. In no case has it ever been contended that such an Act amounted to an exercise of the judicial function by the legislature. The Act before us lays down a law to be applied by courts in future in the adjudication of disputes between parties. It also says that the courts shall apply the law notwithstanding that there is an earlier decision on the rights of the parties which are being litigated upon in a subsequent proceeding. The Act does not itself annul any decision of any court. All that it says is that the law laid down is to be applied by courts irrespective of any previous decision. It does not in any sense adjudicate between parties. It, therefore, seems to us that the contention that the impugned Act is really an exercise of judicial power is ill-founded.

5. ***State of W.B. v. Subodh Gopal Bose, 1954 SCR 587 : AIR 1954 SC 92***

Shastri J

13. Now, what is this "police power" and how does the Constitution of India provide for its exercise by the State? Referring to the doctrine of police power in America, I said in *Gopalan case*[7]: "When that power (legislative power) was threatened with prostration by the excesses of due process, the equally vague and expansive doctrine of 'police power'

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i.e. the power of Government to regulate private rights in public interest was evolved to counteract such excesses." And Das, J.[8] said that the content of due process of law had to be narrowed down by the "enunciation and application of the new doctrine of police power as an antidote or palliative to the former". This Court held in the aforesaid case that the framers of our Constitution definitely rejected the doctrine of due process of law. Is it to be supposed that they accepted the "antidote" doctrine of police power and embodied it in clause (1) of Article 31 as a specific power conferred on the legislatures to deprive persons of their property? The suggestion seems unwarranted and, indeed, contrary to the scheme of our Constitution.

DAS J

...46 After noticing the argument of learned counsel for the petitioner Mukherjea, J. at p. 266 *et seq* found it impossible to introduce the American doctrine of due process of law into our Article 21. If the language of our Article 21 could not be stretched to square with the American due process clause so as to give effect to the suggested enlargement of the scope of our fundamental right to life and personal liberties but had to be interpreted by giving the words their ordinary natural meaning I cannot see why the language of Article 31 should not be construed in the usual way so as to give effect to the plain intention of our Constitution makers. I say with the utmost humility that the proper method of approach is to adopt the golden rule of construction referred to in the judgment of My Lord quoted above and not to start off with any kind of assumption that our Constitution must be regarded as having reproduced this or that doctrine.

6. ***State of Madras v. V.G. Row, 1952 SCR 597 : AIR 1952 SC 196 : 1952 Cri LJ 966***

3. Before proceeding to consider this question, we think it right to point out, what is sometimes overlooked, that our Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution, unlike as in America where the Supreme Court has assumed extensive powers of reviewing legislative acts undercover of the widely interpreted "due process" clause in the Fifth and Fourteenth Amendments. If, then, the courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the "fundamental rights", as to which this Court has been assigned the role of a sentinel on the qui vive. While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute. We have ventured on

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these obvious remarks because it appears to have been suggested in some quarters that the courts in the new set-up are out to seek clashes with the legislatures in the country.

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CONSTITUENT ASSEMBLY DEBATES

OFFICIAL REPORT

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[The Honourable Shri Ghanshyam Singh Gupta]

rings, the Chair again puts it to the vote and then sends Ayes and Noes to the lobbies. The Teller counts the votes and after that, it is declared that a certain motion is lost or is carried. This was not done at all. In fact, it was in the process of declaration by the Chair that the motion is or is not carried that the Chair was pleased to say that this thing stands over. Anybody who says that the Chair finally declared that that motion was carried or lost is wrong.

Mr. Vice-President: It merely shows the depth of my ignorance. I used the word which should not have been used. I used the word 'reopen'. I am glad that the matter has been set right. I only wish that I had sufficient—what shall I say—ability to act in the way in which the Honourable Mr. Gupta has done. I now put amendment No. 512 to vote.

The question is:

'That in article 14, the following be added as clause (4):—

"(4) The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probables cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.' "

The amendment was negatived.

Mr. Vice-President : We come to Mr. Krishnamachari's amendment which was accepted by Dr. Ambedkar.

Shri H. V. Kamath: Is it necessary to say that Dr. Ambedkar has accepted or rejected every time?

Mr. Vice-President : Sometimes it is necessary. Not always. I now put the amendment to vote.

The question is:

"That in clause 2 of article 14 after the word 'shall be' the words 'prosecuted and' be inserted."

The amendment was adopted.

Mr. Vice-President : Now the question is:

"That article 14, as amended, stand part of the Constitution."

The motion was adopted.

Article 14, as amended was added to the Constitution.

Article 15

Mr. Vice-President : Now the motion before the House is: that article 15 form part of the Constitution.

We shall go over the amendments one after another. 515 is ruled out of order. Nos. 516, 517, 518 and 532 are similar and of these I can allow 516 to be moved as also 517 both standing in the name of Shri Brajeshwar Prasad.

Shri Brajeshwar Prasad: (Bihar : General): Sir, I am not moving 516 and 517.

(Amendments Nos. 518, 532, 519 and 520 were not moved.)

Mr. Vice-President : No. 521 is blocked. Then 522, 523, 524, 525, 528 and 530 are similar. I can allow 523 to be moved.

Kazi Syed Karimuddin (C.P. & Berar: Muslim): Mr. Vice-President, Sir, if the proposed amendment by the Drafting Committee is accepted and the article is allowed to stand as it is:—

"No person shall be deprived of his life or personal liberty except according to procedure established by law.....".

then in my opinion, it will open a sad chapter in the history of constitutional law. Sir, the Advisory Committee on Fundamental Rights appointed by the Constituent Assembly had suggested that no person shall be deprived of his life or liberty without due process of law; and I really do not understand how the

words "personal" and "according to procedure established by law" have been brought into article 15 by the Drafting Committee.

Shri Lakshmi Kanta Maitra: Sir, is the honourable Member moving his amendment or not?

Mr. Vice-President : In order to meet the requirements of technicalities, please move your amendment first.

Kazi Syed Karimuddin: Sir, I beg to move—

"That in article 15, for the words "No person shall be deprived of his life or personal liberty except according to procedure established by law" the words "No person shall be deprived of his life or liberty without due process of law" be substituted."

Continuing my arguments Sir, if the words "according to procedure established by law" are enacted, there will be very great injustice to the law courts in the country, because as soon as a procedure according to law is complied with by a court, there will be an end to the duties of the court and if the court is satisfied that the procedure has been complied with, then the judges cannot interfere with any law which might have been capricious, unjust or iniquitous. The clause, as it stands, can do great mischief in a country which is the storm centre of political parties and where discipline is unknown. Sir, let us guarantee to individuals inalienable rights in such a way that the political parties that come into power cannot extend their jurisdiction in curtailing and invading the Fundamental Rights laid down in this Constitution.

Sir, there is an instance in the American Constitutional law in a case reported, Chambers *Vs.* Florida where an act was challenged in a court of law on the ground that the law was not sound and that it was capricious and unjust. Therefore, my submission is that if the words "according to procedure established by law" are kept then it will not be open to the courts to look into the injustice of a law or into a capricious provision in a law. As soon as the procedure is complied with, there will be an end to everything and the judges will be only spectators. Therefore, my submission is, first, that the words, "except according to procedure established by law" be deleted, and then that the words "without due process of law" be inserted.

Sir, actually I had sent two amendments, one about the word "personal" before the words 'liberty', and the other about substitution of the words "without due process of law" for the words "except according to procedure established by law". But somehow or other, these two amendments have been consolidated, and I am required to move one amendment. Even if my amendment about "personal liberty" is not accepted by the Drafting Committee or Dr. Ambedkar, I do not mind; but the second portion of my amendment should be accepted.

(Amendment No. 524 was not moved.)

Mr. Vice-President : Amendment No. 525. Mr. Naziruddin Ahmad. Do you want to press it?

Mr. Naziruddin Ahmad : Sir, there is a printing mistake which I want to point out.

Mr. Vice-President : All right. Then we come to No. 528 standing in the names of Shri Upendranath Barman, Shri Damodar Swarup Seth and Shri S. V. Krishnamurthy Rao.

Kazi Syed Karimuddin : Sir, I have to raise a point of order here. I said in my speech that I have tabled two separate amendments, one regarding the word 'personal' and the other regarding 'due process of law'. Both these amendments have been consolidated by mistake of the Secretariat. So I have had to move the second part of my amendment. But then, according to the list supplied to us, No. 528 has been bracketted with No. 523—that is my

[Kazi Syed Karimuddin]

amendment. I have moved mine, and so No. 528 cannot be moved now, but only put to vote, according to the practice followed in this House.

Mr. Vice-President : All right. We need not move No. 528.

Shri S. V. Krishnamurthy Rao (Mysore): But there is a difference, in that in No. 528 there is no reference to the word 'personal', whereas No. 523 refers to deletion of this word.

Mr. Vice-President : But they are of similar importance and I have already given my decision. We shall put No. 528 to vote.

Then No. 530 in the name of Mr. Z. H. Lari. Do you want it to be put to the vote?

Mr. Z. H. Lari: (United Provinces: Muslim): Yes, Sir.

Mr. Vice-President : Then in my list come No. 524, second part, No. 526 and No. 527. These are almost the same. No. 526 may be moved.

Mahboob Ali Baig Sahib Bahadur (Madras : General): Sir, I beg to move:

"That in article 15 for the words "except according to procedure established by law" the words, "save in accordance with law" be substituted."

In the note given by the Drafting Committee, it is stated that they made two changes from the proposition or article passed by this Assembly in the month of August, April or May of 1947. The first is the insertion of the word 'personal' before liberty, and the reason given is that unless this word 'personal' finds a place there, the clause may be construed very widely so as to include even the freedoms already dealt with in article 13.

That is the reason given for the addition of the word 'personal'. As regards why the original words "without due process of law" were omitted and the present words "except according to procedure established by law" are inserted, the reason is stated to be that the expression is more definite and such a provision finds place in article 31 of the Japanese Constitution of 1946. I will try to confine myself to the second change.

It is no doubt true that in the Japanese Constitution article 31 reads like this but if the other articles that find place in the Japanese Constitution (*viz.*, articles 32, 34 and 35) had also been incorporated in this Draft Constitution that would have been a complete safe guarding of the personal liberty of the citizen. This Draft Constitution has conveniently omitted those provisions.

Article 32 of the Japanese Constitution provides that "no person shall be denied the right of access to the court." According to the present expression it may be argued that the legislature might pass a law that a person will have no right to go to a court of law to establish his innocence. But according to the Japanese Constitution article 32 clearly says that "no person shall be denied the right of access to the court". Is there such a corresponding provision in this Draft Constitution? That is the question. It does not find any place at all.

Article 34 of the Japanese Constitution provides that "no person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel, nor shall be detained without adequate cause and upon demand of any such person such cause should be immediately shown in open court in his presence and in the presence of his counsel." Such a clear right has not been given in these draft provisions.

Further, article 35 provides that the right of all persons to be secured in their homes and against entry, searches, etc. shall not be impaired, except upon warrant issued only for probable cause and so on. If for the sake of clarity and definiteness you have imported into this Draft Constitution article 31 of the Japanese Constitution you should in fairness have incorporated the

other articles of the Japanese Constitution, which are relevant and which were enacted for safeguarding the personal liberty of the honest citizen. May I ask the Drafting Committee through its Chairman whether it is clear from this constitution that a man who has been arrested and detained has got the right to resort to a court and prove his innocence? It may be said that the expression "except according to procedure established by law" covers the point but the expression means "procedure established by law" of the legislature and it will competent for the legislature to lay down a provision that in the matter of detention of persons whether for political or other reasons, the jurisdiction of the courts is ousted. We know the decisions of the High Courts of India, especially of Madras and some other High Courts, where it has been laid down by these courts that it is open to the legislature to say that the courts shall not interfere with the action taken by the Government in the case of certain citizens whom they consider to be committing an offence or about to commit an offence or are likely to commit an offence. It is not open to the court to go into the merits or demerits of the grounds on which a person has been detained. The only extent to which the courts can go is to find out whether there is *bona fides* or *mala fides* for the action of the Government, and the burden is laid upon the person to prove that there is *mala fides* on the part of the Government in having issued a warrant of detention or arrest. Therefore the words "except according to procedure laid down by law" would mean, and according to me it does mean, that the future legislature might pass a law by which the right of a citizen to be tried by a court to establish his innocence could be taken away. I do not by this mean to convey that under certain circumstances it may not be necessary for Government to prevent a person from committing an offence and to take the precaution of arresting him and thus prevent him from committing an offence. But I submit that there must be the right of the citizen to go to a court to prove that the ground on which he has been arrested is wrong and he is innocent. That is the elementary right of the citizen as against the executive which might be clothed with power by a party legislature which might pass a law saying that the executive is empowered to take away the liberty of a person under certain circumstances and he will have no right to go to court and prove his innocence. If the framers of the Draft Constitution are able to tell us that these words "except according to procedure established by law" do not deprive a person of his right to go before the court and establish his innocence and he is not prevented from such a course, then it will be another matter. But we must understand that the words "without due process of law" have been held in England and other countries to convey the meaning that every citizen has got the right, when an action has been taken against him depriving him of his personal liberty, to go before the court and say that he is innocent. That right is given under the expression "without due process of law" or "save in accordance with law". In England the law of the land does not deprive a man of this fundamental and elementary right. All laws that may be made are subject to the relevant principle that no man shall be convicted and no man shall be deprived of his liberty without a chance being given to him to prove that he is innocent. Therefore it must be a law, as I have submitted, which will hear him before it condemns a man.

The only reason which has been advanced in the footnote is that this is more definite and that it finds a place in the Japanese Constitution. As I have already stated, let us not sacrifice the liberty of the subject to prove his innocence, by resorting to the provisions of the Japanese Act and not complete that right of the citizen to be tried—that liberty—by omitting the other provisions of the Japanese Act. I shall be satisfied if all the provisions of the Japanese Constitution find a place here, because the other provisions

[Mahboob Ali Baig Sahib Bahadur]

clearly state that no person can be deprived of his liberty without his being given the chance to go to court and all assistance given to him. I therefore object to the words "except according to procedure established by law." If by any other method which may be said to be definite provision they can ensure that the citizen cannot be condemned without being heard by a court, I shall be satisfied. That is my reason for moving this amendment.

Mr. Vice-President : Amendment Nos. 529 and 531 are disallowed as verbal amendments.

(Amendment No. 533 was not moved.)

We can now proceed with the general discussion on article 15.

Pandit Thakur Dass Bhargava (East Punjab : General): Sir, I sent an amendment No. 525, which I wanted to amend by amendment No. 9 on List No. 1 (Third week). This and amendment No. 528 are the same. The amendment which has been moved by Mr. Karimuddin differs from these in so far as that the word "personal" before the word "liberty" does not appear in his amendment. I am opposed to the amendment of Mr. Karimuddin. The section as it is, with this amendment namely the substitution of the words "without due process of law" for the words "except according to procedure established by law" is the one which I wish to support.

In this connection the first question that arises is what is the meaning of the word 'law'? According to the general connotation of the word, so widely accepted and the connotation which has been given to this word by Austin, law means an Act enacted by the legislatures whereas I submit that when Dicey used his words "law of the land" he meant law in another meaning.

Similarly, when the Japanese Constitution and other Constitutions used this word in the broad sense they meant to convey by the word 'law' universal principles of justice etc.

According to the present section procedure is held sacrosanct whereas the word 'law' really connotes both procedural law as well as substantive law. I have used the word 'law' in the general sense. Though these words "without due process of law" which are sought to be substituted for the words in the section have not been defined anywhere, their meanings and implications should be understood fully. By using these words "without due process of law" we want that the courts may be authorised to go into the question of the substantive law as well as procedural law. When an enactment is enacted, according to the amendment now proposed to be passed by this House, the courts will have the right to go into the question whether a particular law enacted by Parliament is just or not, whether it is good or not, whether as a matter of fact it protects the liberties of the people or not. If the Supreme Court comes to the conclusion that it is unconstitutional, that the law is unreasonable or unjust, then in that case the courts will hold the law to be such and that law will not have any further effect.

As regards procedure also, if any legislature takes it into its head to divest itself of the ordinary rights of having a good procedural law in this country, to that extent the court will be entitled to say whether the procedure is just or not. This is within the meaning of the word 'law' as it is used in this amendment and as it is generally used. The word 'law' has also not been defined in this Constitution. For the purpose of article 8 the word 'law' has been defined. Otherwise it has not been defined. I would therefore submit that if the words as used in the section remained, namely 'procedure established by law', we will have to find out what is the meaning of the word 'law'. These words would remain vague and it will result in misconceptions and misconstructions. Therefore, unless and until we understand the meaning

of "due process of law" we will not be doing justice to the amendment proposed. I therefore want to suggest that the words "due process of law" without being defined convey to us a sense as used in the American law as opposed to other laws. What will be the effect of this change? To illustrate this I would refer the House to Act XIV of 1908 called the Black Law under which thousands, if not hundreds of thousands of Congressmen were sent to jail. According to Act XIV of 1908 the Government took to themselves the powers of declaring any organisation illegal by the mere fact that they passed a notification to that effect. This Act, when passed, was condemned by the whole of India. But the Government of the day enacted it in the teeth of full opposition. When the non-co-operation movement began it was civil disobedience of this law with which the Congress fought its battle. The Courts could not hold that the notification of the Government was wrong. The courts were not competent to hold that any organisation or association of persons was legal though its objects were legal. The objects of the Congress were peaceful. They wanted to attain self-government but by peaceful and legitimate means. All the same, since the Government had notified, the courts were helpless. This legislation demonstrates the need of the powers of "due process."

Similarly I will give another illustration, and that is Section 26 of the Defence of India Act. We know that the Federal Court held this Section to be illegal and a new Ordinance had to be issued. Unless and until therefore you invest the court with such power and make this Section 15 really justifiable there is no guarantee that we will enjoy the freedoms that the Constitution wants to confer upon us.

The House has already accepted the word "reasonable" in article 13. At least 70 per cent. of the Acts which can evolve personal liberty have now come under the jurisdiction of the courts, and the courts are competent to pronounce an opinion on such laws, whether they are reasonable or not. The House is now estopped from adopting another principle. In regard to personal property and life the question is much more important. So far as the question of life and personal liberty are concerned they must be also under the category of subjects which are within the jurisdiction of the courts.

Therefore it is quite necessary that the House should accept this amendment. There are two ways, as suggested by the previous speakers: either you must put all the sections as in the Japanese Constitution, and we should pass many of the amendments tabled by Messrs. Lari and Karimuddin one of which you were pleased to declare carried in the first instance and which was later declared lost. They seek to introduce into the Constitution principles which the legislature will in future be unable to contravene. All those amendments regarding Fundamental Rights will be carried *ipso facto* if this one amendment of "due process" is accepted. Another thing which will be achieved by the acceptance of this one amendment is a recognition in this Constitution of the real genius of the people. In the old days we have heard of seven or eight *Rishis*, all very pious and intelligent people, holding real power in the land. To them, well versed in the Shastras, the ministers and the ancient kings went for advice. Those *Rishis* controlled the whole field of administration. This old ideal will practically be achieved if the full bench of the Supreme Court Judges well versed in law and procedure and possessing concentrated wisdom had the final say in regard to peoples' rights.

Mr. Vice-President : The honourable Member's time is up.

Pandit Thakur Dass Bhargava: I have to say many things more, Sir. I know the argument against this amendment is that these words due process of law' are not certain or clear. But may I know what is the exact

[Pandit Thakur Dass Bhargava]

meaning of the word 'morality' put in this Constitution.

Mr. Vice-President : I ask the indulgence of the honourable Member. I intimated to him twice that he has exhausted his time. I have half a dozen notes from people competent to speak on this point. I am quite certain that it is not the wish of the honourable Member to curtail the time which I can allow them.

Pandit Thakur Dass Bhargava: I do not want to curtail the time of the others.

Mr. Vice-President: Then you may have two minutes more.

Pandit Thakur Dass Bhargava: Thank you, Sir.

Shri Upendranath Barman: (West Bengal : General): May I say a few words at this stage, Sir?

Mr. Vice-President : I am sorry I cannot oblige the honourable Member.

Pandit Thakur Dass Bhargava: As I was saying, Sir, many other words used in this Constitution have an uncertain meaning. The words 'decency' and 'morality' have not got a definite meaning.

Then, Sir, it is said that this will tend to weaken the administration by the uncertainties which will be imported if this amendment is carried. But, Sir, our liberties will be certain through the particular law which may be reviewed by the court may become uncertain. The administration will not be weakened thereby. I grant that it may probably be that the administration will not have its way. But we want to have a Government which will respect the liberties of the citizens of India. As a matter of fact, if this amendment is carried, it will constitute the bed-rock of our liberties. This will be a *Magna Carta* along with article 13 with the word 'reasonable' in it. This is only victory for the judiciary over the autocracy of the legislature. In fact we want two bulwarks for our liberties. One is the Legislature and the other is the judiciary. But even if the legislature is carried away by party spirit and is sometimes panicky the judiciary will save us from the tyranny of the legislature and the executive.

In a democracy, the courts are the ultimate refuge of the citizens for the vindication of their rights and liberties. I want the judiciary to be exalted to its right position of palladium of justice and the people to be secure in their rights and liberties under its protecting wings.

I commend my amendment and beg the House to pass it.

Shri Chimanlal Chakkubhai Shah [United States of Kathiawar (Saurashtra)]: Mr. Vice-President, Sir, the right conferred by article 15 is the most fundamental of the Fundamental Rights in this Chapter, because it is the right which relates to life and personal liberty without which all other rights will be meaningless. Therefore, it is necessary that in defining this right, we must make it clear and explicit as to what it is that we want to confer and not put in restrictions upon the exercise of that right which make it useless or nugatory. I therefore support the amendment which says that the words 'without due process of law' should be substituted for the words 'except in accordance with the procedure established by law.' Sir, the words 'without due process of law' have been taken from the American Constitution and they have come to acquire a particular connotation. That connotation is that in reviewing legislation, the court will have the power to see not only that the procedure is followed, namely, that the warrant is in accordance with law or that the signature and the seal are there, but it has also the power to see that the substantive provisions of law are fair and just and not unreasonable or oppressive or capricious or arbitrary. That means that the judiciary

is given power to review legislation. In America that kind of power which has been given to the judiciary undoubtedly led to an amount of conservative outlook on the part of the judiciary and to uncertainty in legislation. But our article is in two respects entirely different from the article in the American Constitution. In the American Constitution, the words are used in connection with life, liberty and property. In this article we have omitted the word 'property', because on account of the use of this word in the American Constitution, there has been a good deal of litigation and uncertainty. There has been practically no litigation and no uncertainty as regards the interpretation of the words "due process of law" as applied to 'life' and 'liberty'.

Secondly, Sir, in the word 'liberty' that we have used, we have added the word 'personal' and made it 'personal liberty' to make it clear that this article does not refer to any kind of liberty of contract or anything of that kind, but relates only to life and liberty of person. Therefore, it would be wrong to say that the words 'due process of law' are likely to lead to any uncertainty in legislation or unnecessary interference by the judiciary in reviewing legislation.

Sir, in all Federal Constitutions, the judiciary has undoubtedly the power which at times allows it to review legislation. This is inherent in all Federal Constitutions. In England, for example, the judiciary can never say that a law passed by Parliament is unconstitutional. All it can do is to interpret it. But in Federal Constitutions the judiciary has the power to say that a law is unconstitutional. In several articles of this Constitution, we have ourselves provided for this and given express powers to the judiciary to pronounce any law to be unconstitutional or beyond the powers of the legislature. I have no doubt in my mind that this is a very salutary check on the arbitrary exercise of any power by the executive.

Sir, at times it does happen that the executive requires extraordinary powers to deal with extraordinary situations and they can pass emergency laws. The legislature, which is generally controlled by the executive—because it is the majority that forms the executive—gives such powers to the executive in moments of emergency. Therefore, it is but proper that we should give the right to the judiciary to review legislation.

It may be said that the judiciary may, in times of crisis, not be able to appreciate fully the necessities which have required such kind of legislation. But I have no such apprehension. I have no doubt that the judiciary will take into account fully the necessities of a situation which have required the legislature to pass such a law. But it has happened at times that the law is so comprehensive that the individual is deprived of life and liberty without any opportunity of defence. What is the worst that can happen in an article like this if we put in the words 'without due process of law'? Some man may escape death or jail if the judiciary takes the view that the law is oppressive. Sir, is it not better that nine guilty men may escape than one innocent man suffers? That is the worst that can happen even if the judiciary takes a wrong view.

But, in these days, the executive is naturally anxious to have more and more powers and it gets them. And we have developed a kind of legislation which is called delegated legislation in which the powers are given to subordinate officers to issue warrants and the like. For example, under the Public Safety Measures Acts, if a Commissioner of Police is satisfied that a particular man is acting against the interests of the State or is dangerous to public security, he could detain the man without trial.

We know it to our cost that even the Commissioner of Police does not look into these matters personally as he is expected to do and signs or issues

[Shri Chimanlal Chakkubhai Shah]

warrants on the reports of subordinate officials. It is better under such circumstances that there is some check upon the exercise of such powers if they are arbitrarily used. I therefore fully support the amendment which seeks to substitute the words "without due process of law" in place of the words which have been used in the Article. As Mr. Mahboob Ali Baig has rightly pointed out, these words are taken from the Japanese Constitution but the Drafting Committee has omitted the other provisions which give meaning to these words. Mr. Baig's amendment which seeks to substitute the words "save in accordance with law", I am afraid, will not serve his own purpose. If he has in mind that the full import of all the provisions of the Japanese Constitution read along with the one which the Drafting Committee has put in, should be brought out here, it is better that he accepts the words, "without due process of law", rather than the words "save in accordance with law" which are taken from the Irish Constitution and which probably have the same meaning as the words put in by the Drafting Committee. I therefore fully support amendment No. 528.

Shri Krishna Chandra Sharma (United Provinces: General): Mr. Vice-President, Sir, my amendment No. 523 sought the substitution of the words "without due process of law" for the words "except according to procedure established by law". This article guarantees the personal liberty and life of the citizen. In democratic life, liberty is guaranteed through law. Democracy means nothing except that instead of the rule by an individual, whether a king or a despot, or a multitude, we will have the rule of the law. Sir, the term "without due process of law" has a necessary limitation on the powers of the State, both executive and legislative. The doctrine implied by "without due process of law" has a long history in Anglo-American law. It does not lay down a specific rule of law but it implies a fundamental principle of justice. These words have nowhere been defined either in the English Constitution or in the American Constitution but we can find their meaning through reading the various antecedents of this expression. As a matter of fact, it can be traced back to the days of King John when the barons wrung their charter from him, *i.e.*, the *Magna Carta*. The expression ("Per Legum Terrea") in the *Magna Carta* have come to mean "without due process of law". Chapter 39 of the Charter says:—

> "No free man shall be taken, or imprisoned, disseised, or outlawed, exiled, or in any way destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land."

These words were used again in 1331, 1351 and 1355. Statute No. 28 during the reign of Edward III says:—

> "No man of what state or condition so ever he be, shall be put out of his lands or tenements, nor taken, nor imprisoned, nor indicated, nor put to death, without he be brought to answer by due process of law".

Sir, in the American Constitution, these words were first used in 1791:

> "Nor shall any person . . . . . be deprived of life, liberty or property, without due process of law".

What this phrase means is to guarantee a fair trial both in procedure as well as in substance. The procedure should be in accordance with law and should be appealable to the civilised conscience of the community. It also ensures a fair trial in substance, that is to say, that substantive law itself should be just and appealable to the civilised conscience of the community. Sir, various decisions of the American Supreme Court, when analysed, will stress the four fundamental principles that a fair trial must be given, second, the court or agency which takes jurisdiction in the case must be duly authorised by law to such prerogative, third that the defendant must be allowed an opportunity to present his side of the case and fourth that certain assistance

including counsel and the confronting of witnesses must be extended. These four fundamental points guarantee a fair trial in substance.

As to social progress, my Friend Pandit Bhargava has already spoken and I need not repeat the argument here; but for your enlightenment I would like to read a judgment which clarifies the position. The judgment runs (from Willoughby on the Constitution of the United States, p. 1692) :

"Thus, for example, in 1875, in Loan Association *v.* Topeka the Court said:

"It must be conceded that there are such rights in every free government beyond the control of the state,—a government which recognised no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power is, after all, a despotism..... The theory of our governments, state or municipal, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments—implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B who were husband and wife of each other should be so no longer, but that A should thereafter be the husband of C, and B the wife of D, or which should enact that the home stead now owned by A should henceforth be the property of B."

Sir, with these words I support the amendment.

Shri H. V. Pataskar (Bombay : General): Mr. Vice-President, I have come forward only to take a few minutes of the House for supporting the amendment No. 528 which wants to substitute "except according to procedure established by law" by the words "without due process of law". Already the legal aspect of this matter has been discussed at length in this House, but I want to place it before the House from another point of view. We are, Sir, at the present moment in a state which is going to be a democracy. Now, democracy implies party Government and party Government, in our country, is rather new and we have instances which lead us to think that the party machine at work is likely to prescribe procedures which are going to lead to the nullification of the provision which we have made in the Fundamental Rights, which are being given to the people. We know from experience that in certain provinces there are already legislations which have been enacted and which prescribe certain procedures for detention, which have come in for criticism by the public in a very vehement manner. I therefore, submit, Sir, that it is very essential from the point of view of the right of personal liberty, that the words "due process of law" should be particularly there. With these words, Sir, I support the amendment and would not like to repeat what has been said in favour of this amendment already.

Shri K. M. Munshi: Mr. Vice-President, Sir, I want to support amendment No. 528 which seeks to incorporate the words "without due process of law" in substitution of the words "except according to procedure established by law". In my humble opinion, if the clause stood as it is, it would have no meaning at all, because if the procedure prescribed by law were not followed by the courts, there would be the appeal court in every case, to set things right. This clause would only have meaning if the courts could examine not merely that the conviction has been according to law or according to proper procedure, but that the procedure as well as the substantive part of the law are such as would be proper and justified by the circumstances of the case. We want to set up a democracy; the House has said it over and over again; and the essence of democracy is that a balance must be struck between individual liberty on the one hand and social control on the other. We must not forget that the majority in a legislature is more anxious to

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establish social control than to serve individual liberty. Some scheme therefore must be devised to adjust the needs of individual liberty and the demands of social control. Eminent American constitutional lawyers are agreed on the point that no better scheme could have been evolved to strike a balance between the two. Of course, as the House knows, lawyers delight to disagree and there is a certain volume of opinion against it in America, but as pointed out by my honourable Friend, Mr. C. C. Shah, we have made drastic changes in the American clause. The American clause says that no person shall be deprived of his life, liberty or property without due process of law. That clause created great difficulties with regard to laws relating to property. That word has been omitted. The word 'liberty' was construed widely so as to cover liberty of contract and that word has been qualified. This clause is now restricted to liberty of the person, that is, nobody can be convicted, sent to jail or be sentenced to death without due process of law. That is the narrow meaning of this clause which is now sought to be incorporated by amendment No. 528.

Now, the question we have to consider, I submit, is only this. What are the implications of this 'due process'? 'Due process' is now confined to personal liberty. This clause would enable the courts to examine not only the procedural part, the jurisdiction of the court, the jurisdiction of the legislature, but also the substantive law. When a law has been passed which entitles Government to take away the personal liberty of an individual, the court will consider whether the law which has been passed is such as is required by the exigencies of the case, and, therefore, as I said, the balance will be struck between individual liberty and the social control. In the result, Governments will have to go to the court of law and justify why a particular measure infringing the personal liberty of the citizen has been imposed. As a matter of fact, the fear that in America the 'due process' clause has upset legislative measures, is not correct. I have not got the figures here, but I remember to have read it some where in over 90 per cent of the cases on the 'due process' clause which have gone to the American courts, action of the legislatures has been upheld. In such matters involving personal liberty Governments had to go before the court and justify the need for passing the legislation under which the person complaining was convicted. In a democracy it is necessary that there should be given an opportunity to the Governments to vindicate the measures that they take. Apart from anything else, it is a whole some thing that a Government is given an opportunity to justify its action in a court of law.

I know some honourable Members have got a feeling that in view of the emergent conditions in this country this clause may lead to disastrous consequences. With great respect I have not been able to agree with this view (*Interruption*). Take even our Public Safety Acts in the provinces. In view of the condition in the country they would certainly be upheld by the court of law and even if one out of several acts is not upheld, even then, I am sure, nothing is going to happen. Human ingenuity supported by the legislature and assisted by the able lawyers of each province will be sufficient to legislate in such a manner that law and order could be maintained.

Therefore, my submission is that this clause is necessary for this purpose and is not likely to be abused. We have, unfortunately, in this country legislatures with large majorities, facing very severe problems, and naturally, there is a tendency to pass legislation in a hurry which give sweeping powers to the executive and the police. Now, there will be no deterrent if these legislations are not examined by a court of law. For instance, I read the other day that there is going to be a legislation, or there is already a legislation, in one province in India which denies to the accused the assistance of lawyer. How is that going to be checked? In another province, I read that the certificate

or report of an executive authority—mind you it is not a Secretary of a Government, but a subordinate executive—is conclusive evidence of a fact. This creates tremendous difficulties for the accused and I think, as I have submitted, there must be some agency in a democracy which strikes a balance between individual liberty and social control.

Our emergency at the moment has perhaps led us to forget that if we do not give that scope to individual liberty, and give it the protection of the courts, we will create a tradition which will ultimately destroy even whatever little of personal liberty which exists in this country. I therefore submit, Sir, that this amendment should be accepted.

Shri Alladi Krishnaswami Ayyar (Madras : General): Mr. Vice-President, Sir, the debate on this article reveals that there seems to be a leaning on the part of a good number of members in this House in favour of the expression 'due process' being retained and not for substituting the expression 'procedure established by law', which is the expression suggested by the Drafting Committee in its last stage. I am using the words 'in its last stage' because my honourable Friend Mr. Munshi has taken the opposite view.

Sir, at least in justification of the change suggested by the Drafting Committee, I owe it to myself, to my colleagues and the respected Chairman of the Drafting Committee, to say a few words, because, up to the last moment, presumably, the House is open to conviction.

The expression 'due process' itself as interpreted by the English Judges connoted merely the due course of legal proceedings according to the rules and forms established for the protection of rights, and a fair trial in a court of justice according to the modes of proceeding applicable to the case. Possibly, if the expression has been understood according to its original content and according to the interpretation of English Judges, there might be no difficulty at all. The expression, however, as developed in the United States Supreme Court, has acquired a different meaning and import in a long course of American judicial decisions. Today, according to Professor Will is, the expression means, what the Supreme Court says what it means in any particular case. It is just possible, some ardent democrats may have a greater faith in the judiciary than in the conscious will expressed through the enactment of a popular legislature. Three gentlemen or five gentlemen, sitting as a court of law, and stating what exactly is due process according to them in any particular case, after listening to long discourses and arguments of briefed counsel on either side, may appeal to certain democrats more than the expressed wishes of the legislature or the action of an executive responsible to the legislature. In the development of the doctrine of 'due process', the United States Supreme Court has not adopted a consistent view at all and the decisions are conflicting. One decision very often reversed another decision. I would challenge any member of the Bar with a deep knowledge of the cases in the United States Supreme Court to say that there is anything like uniformity in regard to the interpretation of 'due process'. One has only to take the index in the Law Reports Annotated Edition for fifteen years and compare the decisions of one year with the decisions of another year and he will come to the conclusion that it has no definite import. It all depended upon the particular Judges that presided on the occasion. Justice Holmes took a view favourable to social control. There were other Judges of a Tory complexion who took a strong view in favour of individual liberty and private property. There is no sort of uniformity at all in the decisions of the United States Supreme Court.

Some of my honourable Friends have spoken as if it merely applied to cases of detention and imprisonment. The Minimum Wage Law or a Restraint on Employment have in some cases been regarded as an invasion of personal liberty and freedom, by the United States Supreme Court in its earlier decisions, the theory being that it is an essential part of personal liberty that every

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person in the world be she a woman, be he a child over fourteen years of age or be he a labourer, has the right to enter into any contract he or she liked and it is not the province of other people to interfere with that liberty. On that ground, in the earlier decisions of the Supreme Court it has been held that the Minimum Wage Laws are invalid as invading personal liberty. In recent times I quite realise, after the New Deal, the swing of the pendulum has been other way. Even there, there has not been any consistency or any uniformity. I hope that if this amendment is carried, in the interpretation of this clause our Supreme Court will not follow American precedence especially in the earlier stages but will mould the interpretation to suit the conditions of India and the progress and well-being of the country. This clause may serve as a great handicap for all social legislation, for the ultimate relationship between employer and labour, for the protection of children, and for the protection of women. It may prove fairly alright if only the Judges move with the times and bring to bear their wisdom on particular issues. But since the British days we have inherited a kind of faith in lawyers, legal arguments, legal consultations and in courts; I, for my part, having flourished in the law, have no quarrel with those people who believe in the lawyer. In the earlier stages of American history, lawyers ranged themselves on the side of great Trusts and Combines and in favour of Corporations who were in a position to fee them very well, sometimes in the name of personal liberty, sometimes in the name of protection of property. After all the word 'personal liberty' has not the same content and meaning as is imported into it by some of our friends who naturally feel very sensitive about people being detained without a proper trial. I equally feel it but that is not the meaning of personal liberty attributed by the American Courts in the context of 'due process'. I trust that the House will take into account the various aspects of this question, the future progress of India, the well-being and the security of the States, the necessity of maintaining a minimum of liberty, the need for co-ordinating social control and personal liberty, before coming to a decision. One thing also will have to be taken into account, *viz.*, that the security of the State is far from being so secure as we are imagining at present. Take for example the normal detention cases. I may tell you as a lawyer, I am against the man being detained without his being given an opportunity; but an opportunity is not necessarily given in a court of law, as a result of argument, as a result of evidence, as a result of examination or cross-examination. Today I know in Madras a Special Committee has been appointed consisting of a Judge of the High Court, the Advocate-General of Madras and another person to go into the cases of detention and to find out whether there are proper materials or not. Now all these cases might have to go to Courts of law and possibly it is a good thing for lawyers. Though I am getting old I do not despair of taking part in those contests even in the future.

The support which the amendment has received reveals the great faith which the Legislature and Constitution makers have in the Judiciary of the land. The Drafting Committee in suggesting "procedure" for "due process of law" was possibly guilty of being apprehensive of judicial vagaries in the moulding of law. The Drafting Committee has made the suggestion and it is ultimately for the House to come to the conclusion whether that is correct, taking into consideration the security of the State, the need for the liberty of the individual and the harmony between the two. I am still open to conviction and if other arguments are forthcoming I might be influenced to come to a different conclusion.

Mr. Z. H. Lari : Mr. Vice-President, the last speaker who has spoken on this article has drawn the attention of the House to dangers to the State which are likely to arise if the article as it stands is amended by the amendment No. 528 or 530. I have not got that experience which the learned

speaker has but with the little knowledge of the working of the Legislatures during the last ten years, I can say that it is necessary not only in the interest of individual liberty but in the interest of proper working of legislatures that such a clause as due process of law clause should find a place in the Constitution. It is open to that speaker at the fag end of his life as a lawyer to have a fling at the profession of law but I can say that assistance of lawyers is absolutely essential to secure justice.

Shri Alladi Krishnaswami Ayyar: On a point of order. I had no fling at the profession of law.

Mr. Z. H. Lari: I stand corrected.

I feel that two things are necessary. We all know that the State, these days, is all-powerful. Its coercive processes extend to the utmost limits but still there is a phase of life which must be above the processes of Executive Government, and that is individual liberty. In America no such word as 'personal' existed. There the word liberty alone existed and possibly in that state of things, it was possible to interpret it in such a way as to extend the scope of due process of law to other spheres of life but when the word 'personal liberty' has been definitely inserted in the clause, I doubt whether any Court which is conscious of the requirements of a State as well as conscious of the necessities of individual liberty, will be so uncharitable to the interest of the State as to interpret in a way to thwart the proper working of the State. My friend admitted that in the latter rulings in America itself there has been a recognition of the necessities of the State and the word has been interpreted in such a way as not to obstruct the proper working of the State. My submission would be that in this land our Supreme Court will recognise the limits of individual liberty as well as the necessities of the State and interpret it in such a way as to ensure individual liberty of a man.

Pandit Thakur Dass Bhargava: The Drafting Committee also said so in their note.

Mr. Z. H. Lari: My friend is right; and the only reason which was given by the Drafting Committee of which the honourable Speaker who preceded me was a member also, was that the words 'due process of law' is not specific and the word as was used in the Japanese Constitution is more specific. No doubt the words as they stand in the Japanese Constitution are specific because the procedure is indicated and definitely laid down there. What is the essence of the due process of law? I think they are two. First is, enquiry before you condemn a man. And then there is judgment after trial. If any procedure which is adopted by any legislature provides for the hearing of a person who is suspected or is accused, and then after a proper hearing, enables him to get the benefit of a judgment based on that enquiry, my submission is, that the requirements of the due process of law are complied with. And I would beg of the House to consider whether in any country, however emergent and however unstable its conditions, is it necessary or is it not necessary that every individual citizen should feel that he will be heard before he is condemned, and that he will be dealt within the light of the judgment based on the enquiries and not be subject to arbitrary detention? The House will also remember that lately there was the question of drafting human rights, and already such a draft has been prepared. And one of the clauses there in is that nobody should be subjected to arbitrary detention. Now, what is the way to prevent arbitrary detention? If you have the words in this clause, as they stand at present, namely, 'procedure established by law' it means that the legislature is all-powerful and what ever procedure is deemed proper under the circumstances will be binding upon the courts. But, Sir, there are certain procedures which are the inherent rights of man and they should not be infringed upon by any legislative Assembly. Men as well as

[Mr. Z. H. Lari]

assemblies, or any mass of people are subject to passing emotions, and you will realise that in the present state of things, particularly keeping in view the constitution that we are going to have, namely, a parliamentary government, the legislature is controlled by a Cabinet, which means by the executive. You have also the provisions about having ordinances which means that the cabinet—a body consisting of eight to ten persons—decide upon a particular course of action, issue as an ordinance, and, the legislature then has to approve of it, otherwise it would amount to a vote of censure. Therefore the legislature in the last analysis means only the cabinet or the executive and nothing but the executive. The question before us is whether you are going to give such powers to the Executive which can infringe even the elementary rights of a person, the elementary rights of personal liberty, or whether you should not put certain checks on the executive which can be done only if you accept the amendment which has been moved by a Congress member, *i.e.*, amendment No. 528. My amendment No. 530 is exactly similar.

My friend who spoke on the other side gave instances of legislation in the British period, of rights which were curtailed, and of innocent persons jailed. But I submit with all humility, that every legislature and every government is liable to do such things which the British Government did. You cannot excuse excess of law simply because those excesses are committed by a popularly elected legislature. That is why there are two domains, one is the domain of individual liberty, and the other domain is where the State comes in to regulate our life. What do you leave to the State? You leave to the State everything except personal liberty. As to stability of the State my submission would be that if there are classes or communities which are prone to violence, there are sufficient provisions in this Constitution to deal with them—they are in article 13. There, the State can come in and curtail the liberty of such persons, and even nullify their activities. What can an individual do? If there are parties which have got objectives which run counter to the stability of the State, you have already got enough provisions where-by the State can declare those bodies unlawful. But this particular clause deals with a very small sphere of action, namely, personal liberty. My submission is that our State is not so weak as to be subverted by the activities of a particular individual, and mark that, that individual will not have the liberty to do everything. He can be brought before a court. He can be judged in a court of law; no doubt, he will have the assistance of counsel and the Government will have the obligation to produce evidence against him. Does this amount to curtailing the powers of the State? Does this amount to subverting the State? Does it amount to annihilating the State? With all respect to the previous Speaker, I feel he took a very uncharitable view of the citizens of our State, and took a still more uncharitable view of the strength of the State which will emerge after the promulgation of the new Constitution. No doubt, we have to go by realities. We have to take into consideration stern facts. But I may remind the House of one thing. In America, this clause is accepted and is reproduced in the Japanese Constitution. You know the Americans have been responsible for framing the Japanese Constitution. A constitution for a fascist country, a country where individuals are prone to violence—they wanted to overthrow the peace of the world—when they were drafting a constitution for such a country, composed of such citizens, they laid down clauses 31, 32, 33 and 34 which say that nobody shall be denied access to courts, nobody shall be arrested unless causes are shown against him, and nobody shall be denied the privilege of the assistance of counsel. May I say that if the framers of this latest constitution, based on experience and knowing the nature of the people living in Japan, who are not a very peace

loving people as was demonstrated in the last war, have accepted these provisions, that means that these provisions have stood the test of time and have safeguarded the liberty of the individual and also guaranteed the integrity of the state. There are two things by which we have to go. One is experience of others. No doubt, every clause can be criticised in one way or other. But we have to be guided by experience. Here is the experience of other countries, and this has shown that the words 'due process of law' can exist without jeopardising the existence of the State. Secondly, we know that not only here, but throughout the world every assembly is likely to misuse its power. It is bound to happen. Power corrupts. We should profit by the experience of other countries and by what has been observed for centuries. Or should we go by the *ipse dixit* of X, Y, Z who says that there seems to be some germ of disruption in this clause? My submission is that it is only making a bogey out of nothing. We should not be led away by this bogey into accepting this clause. If this clause is accepted, then the whole Constitution becomes lifeless. The article, as it stands, is lifeless and it makes also the whole Constitution lifeless. Unless you accept this amendment, you would not earn the gratitude of future generations. Therefore, Sir, I pray that this motion which has been supported by several members should be accepted.

With these words, Sir, I support the amendment.

Mr. Vice-President : The House stands adjourned till 10 A.M. tomorrow.

The Constituent Assembly then adjourned till ten of the Clock on Tuesday, the 7th December, 1948.

Mr. Vice-President : Amendment No. 1057 standing in the name of Mr. Karimuddin. The question is:

"That for article 43, the following be substituted:—

"43. The President shall be elected on the basis of adult suffrage."

The amendment was negatived.

Mr. Vice-President : Amendment No. 1068 standing in the name of Mr. Mohammed Tahir.

The question is:

"That in clause (b) of article 43, the word "elected" be deleted."

The amendment was negatived.

Mr. Vice-President : Amendment No. 1064 standing in the name of Mr. Tajamul Husain.

The question is:

"That in clause (a) of article 43, for the words "the members" the words "the elected members" be substituted."

The amendment was adopted.

Mr. Vice-President : Amendment No. 1070 standing in the name of Dr. Ambedkar.

The question is:

"That to article 43 the following explanation be added:—

"Explanation.—In this and the next succeeding artiele, the expression "the legislature of a State" means, where the legislature is bicameral, the Lower House of the legislature."

The amendment was adopted.

Mr. Vice-President : Amendment No. 23 of List I (Fourth Week) standing in the name of Mr. Mohammed Tahir.

The question is:

"That in amendment No. 1070 of the list of amendments in the proposed explanation, for the words "the Lower House of the Legislature" the words "the Legislative Assembly of the State" be substituted."

The amendment was negatived.

Mr. Vice-President : I shall now put the article to vote.

The question is:

"That article 43, as amended stand part of the Constitution."

The motion was adopted.

Article 43, as amended was added to the Constitution.

Article 15

Mr. Vice-President : With the permission of the House, I should like to revert to an article left over: that is article 15. I have before me the proceedings of the House from which it appears—this was considered on the 6th December last—that general discussion had concluded and I had called upon Dr. Ambedkar to reply. At that time it was suggested that efforts should be made to arrive at some kind of understanding so that those who had submitted certain amendments might feel satisfied. I do not know the position now; but we cannot wait any longer. Dr. Ambedkar, will you please make the position clear? If no understanding has been arrived at, I would ask you to reply.

The Honourable Dr. B. R. Ambedkar : Mr. Vice-President, I must confess that I am somewhat in a difficult position with regard to article 15 and the amendment moved by my Friend Pandit Bhargava for the deletion of the words "procedure according to law" and the substitution of the words "due process".

It is quite clear to any one who has listened to the debate that has taken place last time that there are two sharp points of view. One point of view

[The Honourable Dr. B. R. Ambedkar]

says that "due process of law" must be there in this article; otherwise the article is a nugatory one. The other point of view is that the existing phraseology is quite sufficient for the purpose. Let me explain what exactly "due process" involves.

The question of "due process" raises, in my judgment, the question of the relationship between the legislature and the judiciary. In a federal constitution, it is always open to the judiciary to decide whether any particular law passed by the legislature is *ultra vires* or *intra vires* in reference to the powers of legislation which are granted by the Constitution to the particular legislature. If the law made by a particular legislature exceeds the authority of the power given to it by the Constitution, such law would be *ultra vires* and invalid. That is the normal thing that happens in all federal constitutions. Every law in a federal constitution, whether made by the Parliament at the Centre or made by the legislature of a State, is always subject to examination by the judiciary from the point of view of the authority of the legislature making the law. The 'due process' clause, in my judgment, would give the judiciary the power to question the law made by the legislature on another ground. That ground would be whether that law is in keeping with certain fundamental principles relating to the rights of the individual. In other words, the judiciary would be endowed with the authority to question the law not merely on the ground whether it was in excess of the authority of the legislature, but also on the ground whether the law was good law, apart from the question of the powers of the legislature making the law. The law may be perfectly good and valid so far as the authority of the legislature is concerned. But, it may not be a good law, that is to say, it violates certain fundamental principles; and the judiciary would have that additional power of declaring the law invalid. The question which arises in considering this matter is this. We have no doubt given the judiciary the power to examine the law made by different legislative bodies on the ground whether that law is in accordance with the powers given to it. The question now raised by the introduction of the phrase 'due process' is whether the judiciary should be given the additional power to question the laws made by the State on the ground that they violate certain fundamental principles.

There are two views on this point. One view is this; that the legislature may be trusted not to make any law which would abrogate the fundamental rights of man, so to say, the fundamental rights which apply to every individual, and consequently, there is no danger arising from the introduction of the phrase 'due process'. Another view is this: that it is not possible to trust the legislature; the legislature is likely to err, is likely to be led away by passion, by party prejudice, by party considerations, and the legislature may make a law which may abrogate what may be regarded as the fundamental principles which safeguard the individual rights of a citizen. We are therefore placed in two difficult positions. One is to give the judiciary the authority to sit in judgment over the will of the legislature and to question the law made by the legislature on the ground that it is not good law, in consonance with fundamental principles. Is that a desirable principle? The second position is that the legislature ought to be trusted not to make bad laws. It is very difficult to come to any definite conclusion. There are dangers on both sides. For myself I cannot altogether omit the possibility of a Legislature packed by party men making laws which may abrogate or violate what we regard as certain fundamental principles affecting the life and liberty of an individual. At the same time, I do not see how five or six gentlemen sitting in the Federal or Supreme Court examining laws made by the Legislature and by dint of their own individual conscience or their bias or their prejudices be

trusted to determine which law is good and which law is bad. It is rather a case where a man has to sail between Charybdis and Scylla and I therefore would not say anything. I would leave it to the House to decide in any way it likes.

Mr. Vice-President: I shall now put the amendments one by one to vote. No. 523.

The question is:—

"That in article 15, for the words "No person shall be deprived of his life or personal liberty except according to procedure established by law" the words "No person shall be deprived of his life or liberty without due process of law "be substituted."

The amendment was negatived.

Mr. Vice-President : The question is—

"That in article 15, for the words "except according to procedure established by law" the words "due process of law" be substituted."

The amendment was negatived.

Mr. Vice-President : No. 528.

Shri S. V. Krishnamurthy Rao (Mysore): I do not press it.

The amendment was, by leave of the Assembly, withdrawn.

Mr. Vice-President: No. 530.

The question is:—

"That in article 15, for the words "procedure established by law" the words "due process of law" be substituted."

The amendment was negatived.

Mr. Vice-President : No. 526

The question is:—

"That in article 15 for the words "except according to procedure established by law" the words "save in accordance with law" be substituted."

The amendment was negatived.

Mr. Vice-President : No. 527.

The question is:—

"That in article 15 for the words "except according to procedure established by law" the words "except in accordance with law" be substituted."

The amendment was negatived.

Mr. Vice-President : I shall put the article to vote.

The question is:—

That article 15 stand part of the Constitution.

The motion was adopted.

Article 15 was added to the Constitution.

Article 44

Mr. Vice-President : We shall now take up article 44.

The motion is:—

That article 44 form part of the Constitution.

I am going to call over the amendments one by one.

No. 1071 is of a negative character and is therefore disallowed.

(Amendments Nos. 1072 and 1073 were not moved.)

Amendment No. 1074 is disallowed as being formal.

Amendment No. 1075—Dr. Ambedkar.

The Honourable Dr. B. R. Ambedkar :

Sir, I move—

Writ Petition (Civil) No. 247 of 2017

Binoy Viswam v. Union of India

2017 SCC OnLine SC 647

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
(BEFORE A.K. SIKRI AND ASHOK BHUSHAN, JJ.)

Writ Petition (Civil) No. 247 of 2017

Binoy Viswam ..... Petitioner(s)

v.

Union of India & Ors. ..... Respondent(s)

With

Writ Petition (Civil) No. 277 of 2017

And

Writ Petition (Civil) No. 304 of 2017

Decided on June 9, 2017

The Judgment of the Court was delivered by

A.K. SIKRI, J.:— In these three writ petitions filed by the petitioners, who claim themselves to be pubic spirited persons, challenge is laid to the constitutional validity of Section 139AA of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'), which provision has been inserted by the amendment to the said Act vide Finance Act, 2017. Section 139AA of the Act reads as under:

"**Quoting of Aadhaar number. -** (1) Every person who is eligible to obtain Aadhaar number shall, on or after the 1st day of July, 2017, quote Aadhaar number-

(i) in the application form for allotment of permanent account number;

(ii) in the return of income:

Provided that where the person does not possess the Aadhaar Number, the Enrolment ID of Aadhaar application form issued to him at the time of enrolment shall be quoted in the application for permanent account number or, as the case may be, in the return of income furnished by him.

(2) Every person who has been allotted permanent account number as on the 1st day of July, 2017, and who is eligible to obtain Aadhaar number, shall intimate his Aadhaar number to such authority in such form and manner as may be prescribed, on or before a date to be notified by the Central Government in the Official Gazette:

Provided that in case of failure to intimate the Aadhaar number, the permanent account number allotted to the person shall be deemed to be invalid and the other provisions of this Act shall apply, as if the person had not applied for allotment of permanent account number.

(3) The provisions of this section shall not apply to such person or class or classes of persons or any State or part of any State, as may be notified by the Central Government in this behalf, in the Official Gazette.

Explanation. - For the purposes of this section, the expressions -

(i) "Aadhaar number", "Enrolment" and "resident" shall have the same meanings

respectively assigned to them in clauses (a), (m) and (v) of section 2 of the Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016 (18 of 2016);

(ii) "Enrolment ID" means a 28 digit Enrolment Identification Number issued to a resident at the time of enrolment."

2. Even a cursory look at the aforesaid provision makes it clear that in the application forms for allotment of Permanent Account Number (for short, 'PAN') as well as in the income-tax returns, the assessee is obliged to quote Aadhaar number. This is necessitated on any such applications for PAN or return of income on or after July 01, 2017, which means from that date quoting of Aadhaar number for the aforesaid purposes becomes essential. Proviso to sub-section (1) gives relaxation from quoting Aadhaar number to those persons who do not possess Aadhaar number but have already applied for issuance of Aadhaar card. In their cases, the Enrolment ID of Aadhaar application form is to be quoted. It would mean that those who would not be possessing Aadhaar card as on July 01, 2017 may have to necessarily apply for enrolment of Aadhaar before July 01, 2017.

3. The effect of this provision, thus, is that every person who desires to obtain PAN card or who is an assessee has to necessarily enrol for Aadhaar. It makes obtaining of Aadhaar card compulsory for those persons who are income-tax assessees. Proviso to sub-section (2) of Section 139AA of the Act stipulates the consequences of failure to intimate the Aadhaar number. In those cases, PAN allotted to such persons would become invalid not only from July 01, 2017, but from its inception as the deeming provision in this proviso mentions that PAN would be invalid as if the person had not applied for allotment of PAN, i.e. from the very beginning. Sub-section (3), however, gives discretion to the Central Government to exempt such person or class or classes of persons or any State or part of any State from the requirement of quoting Aadhaar number in the application form for PAN or in the return of income.

4. The challenge is to this compulsive nature of provision inasmuch as with the introduction of the aforesaid provision, no discretion is left with the income-tax assessees insofar as enrolment under the Aadhaar (Targeting Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (hereinafter referred to as the 'Aadhaar Act') is concerned. According to the petitioners, though Aadhaar Act prescribes that enrolment under the said Act is voluntary and gives choice to a person to enrol or not to enrol himself and obtain Aadhaar card, this compulsive element thrusted in Section 139AA of the Act makes the said provision unconstitutional. The basis on which the petitioners so contend would be taken note of at the appropriate stage. Purpose of these introductory remarks was to highlight the issue involved in these writ petitions at the threshold.

5. Before we take note of the arguments advanced by the petitioners and the rebuttal thereof by the respondents, it would be in the fitness of things to take stock of historical facts pertaining to the Aadhaar scheme and what Aadhaar enrolment amounts to.

Aadhaar Scheme and its administrative and statutory framework

6. Respondent No. 1, Union of India, through the Planning Commission, issued Notification dated January 28, 2009, constituting the Unique Identification Authority of India (for short, 'UIDAI') for the purpose of implementing of Unique Identity (UID) scheme wherein a UID database was to be collected from the residents of India. Pursuant to the said Notification, the Government of India appointed Shri Nandan Nilekhani, an entrepreneur, as the Chairman of the UIDAI on July 02, 2009. According to this scheme, every citizen of India is entitled to enrol herself/himself with it and get a unique, randomnly selected 12 digit number. For such enrolment, every person so intending would have to provide his/her personal information along with biometric

details such a fingerprints and iris scan for future identification. Accordingly, it is intended to create a centralized database under the UIDAI with all the above information. The scheme was launched in September 2010 in the rural areas of Maharashtra and thereafter extended all over India. One of the objects of the entire project was non-duplication and elimination of fake identity cards.

7. On December 03, 2010, the National Identification Authority of India Bill, 2010 was introduced in the Rajya Sabha. On December 13, 2011, the Standing Committee Report was submitted to the Parliament stating that both the Bill and project should be re-considered. The Parliamentary Standing Committee on Finance rejected the Bill of 2010 as there was opposition to the passing of the aforesaid Bill by the Parliament. Be that as it may, the said Bill of 2010 did not get through. The result was that as on that date, Aadhaar Scheme was not having any statutory backing but was launched and continued to operate in exercise of executive power of the Government. It may also be mentioned that the Government appointed private enrollers and these private collection/enrolment centres run by private parties continued to enrol the citizens under the UID scheme.

8. Writ Petition (Civil) No. 494 of 2012, under Article 32 of the Constitution of India, was preferred by Justice K.S. Puttuswamy, a former Judge of the Karnataka High Court before this Court, challenging the UID scheme stating therein that the same does not have any statutory basis and it violated the 'Right to Privacy', which is a facet of Article 21 of the Constitution. This Court decided to consider the plea raised in the said writ petition and issued notice. Vide order dated September 23, 2013, the Court also passed the following directions:

> "In the meanwhile, no person should suffer for not getting the Aadhaar card in spite of the fact that some authority had issued a circular making it mandatory and when any person applies to get the Aadhaar Card voluntarily, it may be checked whether that person is entitled for it under the law and it should not be given to any illegal immigrant."

9. In the meanwhile, various writ petitions were filed by public spirited citizens and organisations challenging the validity of the Aadhaar scheme and this Court has tagged all those petitions along with Writ Petition (Civil) No. 494 of 2012.

10. In the meantime, in some proceedings before the Bombay High Court, the said High Court passed orders requiring UIDAI to provide biometric information to CBI for investigation purposes with respect to a criminal trial. This order was challenged by UIDAI by filing Special Leave Petition (Criminal) No. 2524 of 2014, in which orders dated March 24, 2014 were passed by this Court restraining the UIDAI from transferring any biometric information to any agency without the written consent of the concerned individual. The said order is in the following terms:

> "In the meanwhile, the present petitioner is restrained from transferring any biometric information of any person who has been allotted the Aadhaar number to any other agency without his consent in writing.
>
> More so, no person shall be deprived of any service for want of Aadhaar number in case he/she is otherwise eligible/entitled. All the authorities are directed to modify their forms/circulars/likes so as to not compulsorily require the Aadhaar number in order to meet the requirement of the interim order passed by this Court forthwith."

11. Thereafter, the aforesaid writ petitions and special leave petitions were taken up together. Matter was heard at length by a three Judges Bench of this Court and detailed arguments were advanced by various counsel appearing for the petitioners as well as the Attorney General for India who appeared on behalf of the Union of India. As stated above, one of the main grounds of attack on Aadhaar Card scheme was that the very collection of biometric data is violative of the 'Right to Privacy', which, in turn,

violated not only Article 21 of the Constitution of India but other Articles embodying the fundamental rights guaranteed under Part III of the Constitution. This argument was sought to be rebutted by the respondents with the submission that in view of eight Judges' Bench judgment of this Court in *M.P. Sharma* v. *Satish Chandra*[1] and that of six Judges' Bench in *Kharak Singh* v. *State of U.P.*[2], the legal position regarding the existence of fundamental Right to Privacy is doubtful. At the same time, it was also accepted that subsequently smaller Benches of two or three Judges of this Court had given the judgments recognising the Right to Privacy as part of Article 21 of the Constitution. On that basis, respondents submitted that the matters were required to be heard by a Larger Bench to debate important questions like:

(i) Whether there is any Right to Privacy guaranteed under the Constitution; and

(ii) If such a Right exists, what is the source and what are the contours of such a Right as there is no express provision in the Constitution adumbrating the Right to Privacy.

12. Though, this suggestion of the respondents were opposed by the counsel for the petitioners, the said Bench still deemed it proper to refer the matter to the Larger Bench and the reasons for taking this course of action are mentioned in paras 12 and 13 of the order dated August 11, 2015 which reads as under:

> "12. We are of the opinion that the cases on hand raise far reaching questions of importance involving interpretation of the Constitution. What is at stake is the amplitude of the fundamental rights including that precious and inalienable right under Article 21. If the observations made in *M.P. Sharma* (supra) and *Kharak Singh* (supra) are to be read literally and accepted as the law of this country, the fundamental rights guaranteed under the Constitution of India and more particularly right to liberty under Article 21 would be denuded of vigour and vitality. At the same time, we are also of the opinion that the institutional integrity and judicial discipline require that pronouncement made by larger Benches of this Court cannot be ignored by the smaller Benches without appropriately explaining the reasons for not following the pronouncements made by such larger Benches. With due respect to all the learned Judges who rendered the subsequent judgments - where right to privacy is asserted or referred to their Lordships concern for the liberty of human beings, we are of the humble opinion that there appears to be certain amount of apparent unresolved contradiction in the law declared by this Court.
>
> 13. Therefore, in our opinion to give a quietus to the kind of controversy raised in this batch of cases once for all, it is better that ratio decidendi of *M.P. Sharma* (supra) and *Kharak Singh* (supra) is scrutinized and the jurisprudential correctness of the subsequent decisions of this Court where the right to privacy is either asserted or referred be examined and authoritatively decided by a Bench of appropriate strength.
>
> (emphasis supplied)"

13. While referring the matter as aforesaid, by another order of the even date, the Bench expressed that it would be desirable that the matter be heard at the earliest. On the same day, yet another order was passed by the Bench in those petitions giving certain interim directions which would prevail till the matter is finally decided by the Larger Bench. We would like to reproduce this order containing the said interim arrangement in toto:

> "INTERIMORDER
>
> After the matter was referred for decision by a larger Bench, the learned counsel for the petitioners prayed for further interim orders. The last interim order in force is the order of this Court dated 23.9.2013 which reads as follows:—

"All the matters require to be heard finally. List all matters for final hearing after the Constitution Bench is over.

In the meanwhile, no person should suffer for not getting the Aadhaar card inspite of the fact that some authority had issued a circular making it mandatory and when any person applies to get the Aadhaar card voluntarily, it may be checked whether that person is entitled for it under the law and it should not be given to any illegal immigrant."

It was submitted by Shri Shyam Divan, learned counsel for the petitioners that the petitioners having pointed out a serious breach of privacy in their submissions, preceding the reference, this Court may grant an injunction restraining the authorities from proceeding further in the matter of obtaining biometrics etc. for an Aadhaar card. Shri Shyam Divan submitted that the biometric information of an individual can be circulated to other authorities or corporate bodies which, in turn can be used by them for commercial exploitation and, therefore, must be stopped.

The learned Attorney General pointed out, on the other hand, that this Court has at no point of time, even while making the interim order dated 23.9.2013 granted an injunction restraining the Unique Identification Authority of India from going ahead and obtaining biometric or other information from a citizen for the purpose of a Unique Identification Number, better known as "Aadhaar card". It was further submitted that the respondents have gone ahead with the project and have issued Aadhaar cards to about 90% of the population. Also that a large amount of money has been spent by the Union Government on this project for issuing Aadhaar cards and that in the circumstances, none of the well-known consideration for grant of injunction are in favour of the petitioners.

The learned Attorney General stated that the respondents do not share any personal information of an Aadhaar card holder through biometrics or otherwise with any other person or authority. This statement allays the apprehension for now, that there is a widespread breach of privacy of those to whom an Aadhaar card has been issued. It was further contended on behalf of the petitioners that there still is breach of privacy. This is a matter which need not be gone into further at this stage.

The learned Attorney General has further submitted that the Aadhaar card is of great benefit since it ensures an effective implementation of several social benefit schemes of the Government like MGNREGA, the distribution of food, ration and kerosene through PDS system and grant of subsidies in the distribution of LPG. It was, therefore, submitted that restraining the respondents from issuing further Aadhaar cards or fully utilising the existing Aadhaar cards for the social schemes of the Government should be allowed.

The learned Attorney General further stated that the respondent Union of India would ensure that Aadhaar cards would only be issued on a consensual basis after informing the public at large about the fact that the preparation of Aadhaar card involving the parting of biometric information of the individual, which shall however not be used for any purpose other than a social benefit schemes.

Having considered the matter, we are of the view that the balance of interest would be best served, till the matter is finally decided by a larger Bench if the Union of India or the UIDA proceed in the following manner:

1. The Union of India shall give wide publicity in the electronic and print media including radio and television networks that it is not mandatory for a citizen to obtain an Aadhaar card;
2. The production of an Aadhaar card will not be condition for obtaining any benefits otherwise due to a citizen;
3. The Unique Identification Number or the Aadhaar card will not be used by the

respondents for any purpose other than the PDS Scheme and in particular for the purpose of distribution of foodgrains, etc. and cooking fuel, such as kerosene. The Aadhaar card may also be used for the purpose of the LPG Distribution Scheme;

4. The information about an individual obtained by the Unique Identification Authority of India while issuing an Aadhaar card shall not be used for any other purpose, save as above, except as may be directed by a Court for the purpose of criminal investigation.

Ordered accordingly."

14. In nutshell, the direction is that obtaining an Aadhaar Card is not mandatory and the benefits due to a citizen under any scheme are not to be denied in the absence of Aadhaar Card. Further, unique identification number or the Aadhaar Card was to be used only for the PDS Scheme and, in particular, for the purpose of distribution of food grains etc. and cooking fuels such as Kerosene and LPG Distribution Scheme, with clear mandate that it will not be used by the respondents for any other purpose. Even the information about the individual collected while issuing an Aadhaar Card was not to be used for any other purpose, except when it is directed by the Court for the purpose of criminal investigation. Thus, making of Aadhaar Card was not to be made mandatory and it was to be used only for PDS Scheme and LPG Distribution Scheme. Thereafter, certain applications for modification of the aforesaid order dated August 11, 2015 was filed before this Court by the Union of India and a five Judges Bench of this Court was pleased to pass the following order:

"3. After hearing the learned Attorney General for India and other learned senior counsels, we are of the view that in paragraph 3 of the Order dated August 11, 2015, if we add, apart from the other two Schemes, namely, PDS Scheme and the LPG Distribution Scheme, the Schemes like The Mahatma Gandhi National Rural Employment Guarantee Scheme 12 (MGNREGS), National Social Assistance Programme (Old Age Pensions, Widow Pensions, Disability Pensions) Prime Minister's Jan Dhan Yojana (PMJDY) and Employees' Provident Fund Organisation (EPFO) for the present, it would not dilute earlier order passed by this Court. Therefore, we now include the aforesaid Schemes apart from the other two Schemes that this Court has permitted in its earlier order dated August 11, 2015.

4. We impress upon the Union of India that it shall strictly follow all the earlier orders passed by this Court commencing from September 23, 2013.

5. We will also make it clear that the Aadhaar card Scheme is purely voluntary and it cannot be made mandatory till the matter is finally decided by this Court one way or the other."

15. Thus, Aadhaar is permitted for some more schemes as well.

16. The petitioner herein, laying stress on the above orders, plead that from a perusal of the various interim orders passed by this Court it is amply clear that the Court has reiterated the position that although there is no interim order against the collection of information from the citizens for the purpose of enrolment for Aadhaar, the scheme is purely voluntary and the same is not to be made mandatory by the Government.

17. While matters stood thus, the Government of India brought in a legislation to govern the Aadhaar Scheme with the enactment of the Aadhaar (Targeted Delivery of Financial and other subsidies, benefits and services) Act, 2016 (hereinafter referred to as the 'Aadhaar Act').

18. Introduction to the said Act gives the reasons for passing that Act and Statement of Objects and Reasons mention the objectives sought to be achieved with the enactment of Aadhaar Act. Introduction reads as under:

"The Unique Identification Authority of India was established by a resolution of

the Government of India in 2009. It was meant primarily to lay down policies and to implement the Unique Identification Scheme, by which residents of India were to be provided unique identity number. This number would serve as proof of identity and could be used for identification of beneficiaries for transfer of benefits, subsidies, services and other purposes.

Later on, it was felt that the process of enrolment, authentication, security, confidentiality and use of Aadhaar related information be made statutory so as to facilitate the use of Aadhaar number for delivery of various benefits, subsidies and services, the expenditures of which were incurred from or receipts therefrom formed part of the Consolidated Fund of India.

The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Bill, 2016 inter alia, provides for establishment of Unique Identification Authority of India, issuance of Aadhaar number to individuals, maintenance and updating of information in the Central Identities Data Repository, issues pertaining to security, privacy and confidentiality of information as well as offences and penalties for contravention of relevant statutory provisions."

19. In the Statement of Objects and Reasons, it is inter alia mentioned that though number of social benefits schemes have been floated by the Government, the failure to establish identity of an individual has proved to be a major hindrance for successful implementation of those programmes as it was becoming difficult to ensure that subsidies, benefits and services reach the unintended beneficiaries in the absence of a credible system to authenticate identity of beneficiaries. Statement of Objects and Reasons also discloses that over a period of time, the use of Aadhaar Number has been increased manifold and, therefore, it is also necessary to take measures relating to ensuring security of the information provided by the individuals while enrolling for Aadhaar Card. Having these parameters in mind, para 5 of the Statement of Objects and Reasons enumerates the objectives which Aadhaar Act seeks to achieve. It reads as under:

""5. The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Bill, 2016 *inter alia*, seeks to provide for -

(a) issue of Aadhaar numbers to individuals on providing his demographic and biometric information to the Unique Identification Authority of India;

(b) requiring Aadhaar numbers for identifying an individual for delivery of benefits, subsidies, and services the expenditure is incurred from or the receipt therefrom forms part of the Consolidated Fund of India;

(c) authentication of the Aadhaar number of an Aadhaar number holder in relation to his demographic and biometric information;

(d) establishment of the Unique Identification Authority of India consisting of a Chairperson, two Members and a Member-Secretary to perform functions in pursuance of the objectives above;

(e) maintenance and updating the information of individuals in the Central Identities Date Repository in such manner as may be specified by regulations;

(f) measures pertaining to security, privacy and confidentiality of information in possession or control of the Authority including information stored in the Central Identities Date Repository; and

(g) offences and penalties for contravention of relevant statutory provisions."

20. Some of the provisions of this Act, which have bearing on the matter that is being dealt with herein, may be taken note of. Sections 2(a), 2(c), 2(d), 2(e), 2(g), 2 (h), 2(k), 2(l), 2(m), 2(n), Section 3, Section 7, Section 28, Section 29 and Section 30 reads as under:

"2(a) "Aadhaar number" means an identification number issued to an individual

under sub-section (3) of section 3;

xxx xxx xxx

2(c) "authentication" means the process by which the Aadhaar number alongwith demographic information or biometric information of an individual is submitted to the Central Identities Data Repository for its verification and such Repository verifies the correctness, or the lack thereof, on the basis of information available with it;

2(d) "authentication record" means the record of the time of authentication and identity of the requesting entity and the response provided by the Authority thereto;

2(e) "Authority" means the Unique Identification Authority of India established under sub-section (1) of section 11;

xxx xxx xxx

2(g) "biometric information" means photograph, finger print, Iris scan, or such other biological attributes of an individual as may be specified by regulations;

2(h) "Central Identities Data Repository" means a centralised database in one or more locations containing all Aadhaar numbers issued to Aadhaar number holders along with the corresponding demographic information and biometric information of such individuals and other information related thereto;

xxx xxx xxx

2(k) "demographic information" includes information relating to the name, date of birth, address and other relevant information of an individual, as may be specified by regulations for the purpose of issuing an Aadhaar number, but shall not include race, religion, caste, tribe, ethnicity, language, records of entitlement, income or medical history;

2(l) "enrolling agency" means an agency appointed by the Authority or a Registrar, as the case may be, for collecting demographic and biometric information of individuals under this Act;

2(m) "enrolment" means the process, as may be specified by regulations, to collect demographic and biometric information from individuals by the enrolling agencies for the purpose of issuing Aadhaar numbers to such individuals under this Act;

2(n) "identity information" in respect of an individual, includes his Aadhaar number, his biometric information and his demographic information;

3. **Aadhaar number.** - (1) Every resident shall be entitled to obtain an Aadhaar number by submitting his demographic information and biometric information by undergoing the process of enrolment:

Provided that the Central Government may, from time to time, notify such other category of individuals who may be entitled to obtain an Aadhaar number.

(2) The enrolling agency shall, at the time of enrolment, inform the individual undergoing enrolment of the following details in such manner as may be specified by regulations, namely:

(a) the manner in which the information shall be used;

(b) the nature of recipients with whom the information is intended to be shared during authentication; and

(c) the existence of a right to access information, the procedure for making requests for such access, and details of the person or department in-charge to whom such requests can be made.

(3) On receipt of the demographic information and biometric information under sub-section (1), the Authority shall, after verifying the information, in such manner as may be specified by regulations, issue an Aadhaar number to such individual.

xxx xxx xxx

7. **Proof of Aadhaar number necessary for receipt of certain subseidies, benefits and services, etc.** -The Central Government or, as the case may be, the State Government may, for the purpose of establishing identity of an individual as a condition for receipt of a subsidy, benefit or service for which the expenditure is incurred from, or the receipt therefrom forms part of, the Consolidated Fund of India, require that such individual undergo authentication, or furnish proof of possession of Aadhaar number or in the case of an individual to whom no Aadhaar number has been assigned, such individual makes an application for enrolment:

Provided that if an Aadhaar number is not assigned to an individual, the individual shall be offered alternate and viable means of identification for delivery of the subsidy, benefit or service.

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28. **Security and confidentiality of information** - (1) The Authority shall ensure the security of identity information and authentication records of individuals.

(2) Subject to the provisions of this Act, the Authority shall ensure confidentiality of identity information and authentication records of individuals.

(3) The Authority shall take all necessary measures to ensure that the information in the possession or control of the Authority, including information stored in the Central Identities Data Repository, is secured and protected against access, use or disclosure not permitted under this Act or regulations made thereunder, and against accidental or intentional destruction, loss or damage.

(4) Without prejudice to sub-sections (1) and (2), the Authority shall—

(a) adopt and implement appropriate technical and organisational security measures;

(b) ensure that the agencies, consultants, advisors or other persons appointed or engaged for performing any function of the Authority under this Act, have in place appropriate technical and organisational security measures for the information; and

(c) ensure that the agreements or arrangements entered into with such agencies, consultants, advisors or other persons, impose obligations equivalent to those imposed on the Authority under this Act, and require such agencies, consultants, advisors and other persons to act only on instructions from the Authority.

(5) Notwithstanding anything contained in any other law for the time being in force, and save as otherwise provided in this Act, the Authority or any of its officers or other employees or any agency that maintains the Central Identities Data Repository shall not, whether during his service or thereafter, reveal any information stored in the Central Identities Data Repository or authentication record to anyone:

Provided that an Aadhaar number holder may request the Authority to provide access to his identity information excluding his core biometric information in such manner as may be specified by regulations.

29. **Restriction on sharing information**. - (1) No core biometric information, collected or created under this Act, shall be—

(a) shared with anyone for any reason whatsoever; or

(b) used for any purpose other than generation of Aadhaar numbers and authentication under this Act.

(2) The identity information, other than core biometric information, collected or created under this Act may be shared only in accordance with the provisions of this Act and in such manner as may be specified by regulations.

(3) No identity information available with a requesting entity shall be—

(a) used for any purpose, other than that specified to the individual at the time of submitting any identity information for authentication; or

(b) disclosed further, except with the prior consent of the individual to whom such information relates.

(4) No Aadhaar number or core biometric information collected or created under this Act in respect of an Aadhaar number holder shall be published, displayed or posted publicly, except for the purposes as may be specified by regulations.

30. **Biometric information deemed to be sensitive personal information.**- The biometric information collected and stored in electronic form, in accordance with this Act and regulations made thereunder, shall be deemed to be "electronic record" and "sensitive personal data or information", and the provisions contained in the Information Technology Act, 2000 (21 of 2000) and the rules made thereunder shall apply to such information, in addition to, and to the extent not in derogation of the provisions of this Act.

Explanation.— For the purposes of this section, the expressions—

(a) "electronic form" shall have the same meaning as assigned to it in clause (r) of sub-section (1) of section 2 of the Information Technology Act, 2000 (21 of 2000);

(b) "electronic record" shall have the same meaning as assigned to it in clause (t) of sub-section (1) of section 2 of the Information Technology Act, 2000 (21 of 2000);

"sensitive personal data or information" shall have the same meaning as assigned to it in clause (iii) of the Explanation to section 43A of the Information Technology Act, 2000 (21 of 2000)."

21. That apart, Chapter VII which comprises Sections 34 to 47, mentions various offences and prescribes penalties therefor.

22. Even the Constitutional validity of the aforesaid Act is challenged in this Court in Writ Petition (C) No. 797 of 2016, which has also been tagged along with Writ Petition (C) No. 494 of 2012, the lead matter in the batch of matters which has been referred to the Constitution Bench.

23. At this juncture, by Finance Act, 2017, Income Tax Act is amended with introduction of Section 139AA which provision has already been reproduced. It would be necessary to mention at this stage that since challenge to the very concept of Aadhaar i.e. unique identification number is predicated primarily on Right to Privacy, when instant writ petitions were initially listed before us, we suggested that these matters be also tagged along with Writ Petition (C) No. 494 of 2012 and other matters which have been referred to the Constitution Bench. Pertinently, in the counter affidavit filed on behalf of the Union of India also, plea has been taken that the matters be tagged along with those pending writ petitions and be decided by a larger Bench. On this suggestion, reaction of the learned counsel for the petitioners was that petitioners would not be pitching their case on the 'Right to Privacy' and would be questioning the validity of Section 139AA of the Act primarily on Articles 14 and 19 of the Constitution. On this basis, their submission was that this Bench should proceed to adjudicate the matter. Therefore, we make it clear at the outset that we are not touching upon the privacy issue while determining the question of validity of the impugned provision of the Act.

The Arguments

24. Mr. Datar, learned senior counsel who opened the attack on behalf of the petitioners, started by stating the historical fact pertaining to introduction of Aadhaar Scheme, leading to the passing of Aadhaar Act and thereafter the impugned provision

and referring to the various orders passed by this Court from time to time (which have already been reproduced above). After this narration, his first submission was that this Court had, time and again, emphasised by various interim orders that obtaining an Aadhaar Card would be a voluntarily act on behalf of a citizen and it would not be made mandatory till the pendency of the petitions which stand referred to the Constitution Bench now. He further submitted that even Section 3 of the Aadhaar Act spells out that enrollment of Aadhaar is voluntarily and consensual and not compulsory or by way of executive action. He also drew our attention to the proviso to Section 7 of the Aadhaar Act as per which a person is not to be deprived of subsidies as per the various schemes of the Government as the said proviso clearly mentions that if an Aadhaar Number is not assigned to an individual, he shall be offered alternate and viable means of identification for delivery of subsidy, benefit or service. According to him, there was a total reversal of the aforesaid approach for assessees under the Income Tax Act and those who wanted to apply for issuance of PAN Card inasmuch as not only it was made compulsory for them to get Aadhaar enrollment number, but serious consequences were also provided for not adhering to this requirement. In their cases, PAN issued to these assessees had to become invalid, that too from the retrospective effect i.e. from the date when it is issued. Having regard to the aforesaid, the legal submission of Mr. Datar was that Section 139AA was unconstitutional and without legislative competence inasmuch as this provision was enacted contrary to the binding nature of the judgments/directions of this Court which was categorical that Aadhaar had to remain voluntary. Questioning the legislative competence of the legislature to enact this particular law, argument of Mr. Datar was that there were certain implied limitations of such a legislative competence and one of these limitations was that legislature was debarred from enacting a law contrary to the binding nature of decisions of this Court. His submission in this behalf was that though it was within the competence of the legislature to remove the basis of the Supreme Court decision, at the same time, legislature could not go against the decision which was law of the land under Article 141 of the Constitution. He argued that, in the instant case, legislature could not be construed as removing the basis of the various orders of this Court relating to Aadhaar Scheme itself but the impugned provision was inserted in the statute book violating the binding nature of those orders.

25. Dilating on the aforesaid submissions, Mr. Datar argued that the earlier orders of this Court dated August 23, 2015 of the main writ petition specifically permitted Aadhaar to be used only for LPG and PDS. By an order dated October 15, 2015, at the request of the Union of India, it was permitted to be extended to three other schemes, namely, MNREGA, Jan Dhan Yojana etc. The Constitution Bench made it explicitly clear that the Aadhaar scheme could not be used for any other purpose. According to him, the Parliament did not in any manner remove the basis of these decisions. The Aadhaar scheme, as enacted under the Aadhaar Act, continued to retain its voluntary character (as demonstrated by Section 3 of that Act) that existed when Aadhaar was operating under executive instructions. Nonetheless, even if it is argued that the above orders were passed when Aadhaar was based on executive instructions, decisions of this Court continue to be binding as they are made in exercise of the judicial power. According to Mr. Datar, any judgment of a court, whether interim or final, whether rendered in the context of a legislation, delegated legislation (rules/notifications) or even executive action will continue to be binding. In view of the judgment of this Court in *Ram Jawaya Kapoor* v. *State of Punjab*[3], which held that executive and legislative powers are co-extensive under the Constitutional scheme, unless the basis of the judgment is removed by a subsequent enactment, it cannot be argued that a decision based on executive instruction is less binding than other judgments/orders of the Supreme Court, or that the judgment/order loses force if the executive instruction is replaced by law.

26. He also referred to the decision in the case of *Madan Mohan Pathak* v. *Union of India*[4], wherein the direction of the Calcutta High Court to pay bonus to Class-III and Class-IV employees was sought to be nullified by a statutory amendment. This was held to be impermissible by the seven Judges' Bench. He also relied upon *Bakhtawar Trust* v. *M.D. Narayan*[5], wherein, after citing the case-laws on this point, the Court reiterated the principle as follows:

> ""25. The decisions referred to above, manifestly show that it is open to the legislature to alter the law retrospectively, provided the alteration is made in such a manner that it would no more be possible for the Court to arrive at the same verdict. In other words, the very premise of the earlier judgment should be uprooted, thereby resulting in a fundamental change of the circumstances upon which it was founded.
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> 27. Here, the question before us is, whether the impugned Act has passed the test of constitutionality by serving to remove the very basis upon which the decision of the High Court in the writ petition was based. This question gives rise to further two questions - first, what was the basis of the earlier decision; and second, what, if any, may be said to be the removal of that basis?
>
> *(emphasis supplied)"*

27. Based on the above principles, Mr. Datar's fervent plea was that:

(i) The basis of the earlier order of the Supreme Court is that Aadhaar will be made a voluntary scheme, it is a consensual scheme, and that it is to be expressly limited to six specific purposes; and

(ii) No attempt whatsoever has been made to remove the basis of these earlier orders. This alone renders Section 139AA unconstitutional.

28. Arguing that basis of the orders of this Court was not removed, plea of Mr. Datar was that the basis of the said orders was that serious constitutional concerns had been raised about the Aadhaar scheme, and that therefore, pending final decision on its validity by the Supreme Court, it ought to remain voluntary. Consequently, in order to remove the basis of these orders, the Parliament would have to pass a law overturning the voluntary character of Aadhaar itself. Notably, although Parliament did have a chance to do so, it elected not to. The Aadhaar Act came into force on March 25, 2016. This was after the order of this Court. Significantly, however, the Parliament continued to maintain Aadhaar as a voluntary scheme vide Section 3 of the said Act. Mr. Datar submitted that if Parliament so desired, it could have removed the basis of this Court's order by:

(i) Amending Section 3 so that Aadhaar is made compulsory for every resident of India; or

(ii) Introducing either a proviso or adding a sub-section in Section 3 to the following effect:

> "Notwithstanding anything contained in sub-section (1), the Central Government may notify specific purposes for which obtaining Aadhaar numbers may be made mandatory in public interest."

29. However, Parliament elected not to do so as there is no non-obstante clause. Instead of making enrollment for Aadhaar itself mandatory, it made Aadhaar mandatory for filing income-tax returns, even as enrollment itself remained voluntary under Section 3 of the Aadhaar Act. He, thus, submitted that far from taking away the basis of the earlier Supreme Court orders. The Aadhaar Act strengthened and endorsed those orders, while Section 139AA impermissibly attempted to overturn them without taking away their basis. Indeed, Parliament did not even sof ar as include a non-obstante clause in Section 139AA, which would have made it clear that Section would

override contrary laws - clearly indicating once again that Section 13AA was not taking away the basis of the Court's orders. The emphasis of Mr. Datar is that unless suitable/appropriate amendments are made to the Aadhaar Act, the orders of the Court cannot be overruled by the newly inserted Section 139AA.

30. On the aforesaid edifice, the argument built and developed by Mr. Datar is that although the power of Parliament to pass laws with respect to List-I and List-III is plenary, it is subject to two implied limitations:

(i) Parliament or any State legislature cannot pass any law that overrules a judgment; before any law is passed which may result in nullifying a decision, it is mandatory to remove the basis of the decision. Once the basis on which the earlier decision/order/judgment is delivered is removed, Parliament can then pass a law prospectively or retrospectively and with or without a validation clause.

(ii) Implied limitation not to pass contrary laws: The doctrine of harmonious construction applies when there is an accidental collision or conflict between two enactments and the Supreme Court has repeatedly read down one provision to give effect to other. Thus, both the provisions have to be given effect to. But if the collision or conflict is such that one provision cannot co-exist with another, then the latter provision must be struck down. In the present case, obtaining an Aadhaar number continues to be voluntary and explicitly declared to be so. Once the Aadhaar Card is voluntary, it cannot be made mandatory by the impugned Section 139AA of the Act. As long as the Aadhaar enactment holds the field, there is an implied limitation on the power of Parliament not to pass a contrary law.

31. He also advanced two examples of such an implied limitation:

(i) If Parliament, by a statute, makes medical service in rural areas an attractive option for doctors with incentives like preference for post-graduate admissions, higher pay/allowances, or even lower tax, such a scheme is voluntary and only those doctors who want those benefits may opt for it. While such a statute exists, it will not be permissible for Parliament to simultaneously amend the Medical Council Act, 1956 and state that absence of rural service will be a ground to invalidate the doctor's certificate of practice. Thus, what is statutorily voluntary under one Parliamentary Act cannot be made statutorily compulsory under another Parliamentary Act at the same time.

(ii) Second example given by Mr. Datar was that making Aadhaar compulsory only for individuals with severe consequences of cancellation of PAN cards and a deeming provision that they had never applied for PAN is discriminatory when such a provision is not made mandatory for other assessees.

32. Mr. Datar's next plea of violation of Article 14 was based by him on the application of the twin-test of classification viz. there should be a reasonable classification and that this classification should have rational nexus with the objective sought to be achieved as held in *R.K. Dalmia* v. *Justice S.R. Tendolkar*[6]. Mr. Datar conceded that first test was met as individual assessees form a separate class and, to this extent, there is a rational differentiation between individuals and other categories of assessees. The main brunt of his argument was on the second limb of the twin-test of classification which according to him is not satisfied because there is no rational nexus with the object sought to be achieved.

33. Third argument of Mr. Datar was that the affected persons by Section 139AA are individuals who are professionals like lawyers, doctors, architects etc. and lakhs of businessmen having small or micro enterprises. By imposing a draconian penalty of cancelling their PAN cards and deeming that they had never applied for them, there is a direct infringement to Article 19(1)(g). The consequences of not having a PAN card

results in a virtual "civil death" and it will be impossible to carry out any business or professional activity under Rule 114B of the Income Tax Rules, 1962 (hereinafter referred to as the 'Rules'), it will not be possible to operate bank accounts with transactions above Rs. 50,000/-, use credit/debit cards, purchase motor-vehicles, purchase property etc.

34. Elaborating this point, it was submitted by him that once it is shown that the right under Article 19(1)(g) has been infringed, the burden shifts to the State to show that the restriction is reasonable, and in the interests of the public, under Article 19(6) of the Constitution. He referred to *Modern Dental College and Research Centre* v. *State of Madhya Pradesh*[7], wherein this Court held that the correct test to apply in the context of Article 19(6) was the test of proportionality:

> "... a limitation of a constitutional right will be constitutionally permissible if : (i) it is designated for a proper purpose; (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose; (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally (iv) there needs to be a proper relation ('proportionality strict sensu' or 'balancing') between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right."

35. Mr. Datar also submitted that even if the State succeeds in showing a proper purpose and a rational connection with the purpose, thereby meeting the test of Article 14, the impugned law clearly fails on clauses (iii) (narrow tailoring) and (iv) (balancing) of the proportionality test of the above decision. He submitted that the State has failed entirely to show that the cancellation of PAN Cards as a consequence of not enrolling for Aadhaar with its accompanying draconian consequences for the economic life of an individual is narrowly tailored to achieving its goal of tax compliance. It is also submitted that in accordance with the arguments advanced above, the State's own data shows that the problem of duplicate PANs was minuscule, and the gap between the tax payer base and the PAN Card holding population can be explained by plausible factors other than duplicates and forgeries. He questioned the wisdom of legislature in compelling 99.6% of the taxpaying citizenry to enroll for Aadhaar (with the further prospect of seeding) in order to weed out the 0.4% of duplicate PAN Cards, as it fails the proportionality test entirely.

36. On the principle of proportionality, he submitted that this principle was applied in the ***R.K. Dalmia***[8] case as per the following passage:

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> (d) that the Legislature is free to recognize degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;
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> (e) that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation;..."

37. Basic premise of the submissions of Mr. Shyam Divan, learned senior advocate, was also the same as projected by Mr. Datar. He insisted that Section 139AA of the Act, which had made Aadhaar mandatory for income-tax assessees, is unconstitutional. However, in his endeavour to plead that the provision be declared unconstitutional, he approached the subject from an altogether different premise, giving another perception to the whole issue. His basic submission was that every individual or citizen in this country had complete control over his/her body and State cannot insist any person from giving his/her finger tips or iris of eyes, as a condition precedent to enjoy certain rights. He pointed out that all the petitioners in his writ petition were holding PAN Cards and were income-tax assessees but had not enrolled

under Aadhaar Scheme. They were the consentions persons in the society and did not want to give away their finger tips or iris, being consentions objectors, that too, to private persons who were engaged as contractors/private enrollers by the Government for undertaking the job of enrolment under the Aadhaar. It was submitted that the data given to such persons were not safe and there was huge possibility that the same may be leaked. Further, requirement of giving Aadhaar number for every transaction amounted to surveillance by the State and the entire profile of such persons would be available to the State. He also pointed out that with today's technology, there was every possibility of copying the fingerprint and even the iris images. Various cases of fake Aadhaar Card had come to light and even as per the Government's statement, 3.48 lakh bogus Aadhaar Cards were cancelled. There were instances of Aadhaar leak as well. Even hacking was possible. He conceded that these were the issues within the realm of 'Right to Privacy' which were to be decided by the Constitution Bench. However, according to him, various orders passed by this Court in those petitions clearly reflect that the Court had given the directions that Aadhaar Scheme had to be voluntarily; there would not be any illegal implants; and no one would suffer any consequences if he does not enroll himself under the Aadhaar Scheme. He also submitted that even the Aadhaar Act was voluntary in nature which creates rights for citizens and not obligations. According to him, Aadhaar Act envisages free consent for getting certain benefits under social welfare schemes of the Government. On the other hand, Section 139AA of the Act is compulsory and coercive. Pointing out that if Aadhaar number is not mentioned in the income-tax returns, the effect provided under Section 139AA of the Act is that the PAN Card held by such a person would itself become invalid and inoperative which will lead to various adverse consequences inasmuch as for many other purposes as well, PAN Card is used. He referred to Sections 206AA, 196J, 271F and 272B of the Act and Rule 114B of the Rules to demonstrate this. He also referred to the provisions of Identification of Prisoners Act, 1920 which require a prisoner to give his fingerprints for record and submitted that making Aadhaar compulsory amounted to treating every person at par with a prisoner.

38. On the aforesaid premise, Mr. Divan articulated his legal submissions as under:

(i) Section 139AA of the Act is contrary to the concept of 'limited Government'.

(ii) The impugned provision coerces the individuals to part with their private information which was a part of human dignity and, thus, the said provision was violative of Article 21 of the Constitution as it offended human dignity.

(iii) The impugned provision creates the involvement which can be used for surveillance.

(iv) This provision converts right under Aadhaar Act to duty under the Income Tax Act.

39. Elaborating on the argument predicated on the concept of 'Limited Government', Mr. Divan submitted that the Constitution of India was the basic law or grundnorm which ensures democratic governance in this country. Though a sovereign country, its governance is controlled by the provisions of the Constitution which sets parameters within which three wings of the State, namely, Legislature, Executive and Judiciary has to function. Thus, no wing of the State can breach the limitations provided in the Constitution which employs an array of checks and balances to ensure open, accountable government where each wing of the State performs its actions for the benefit of the people and within its sphere of responsibility. The checks and balances are many and amongst them are the respective roles assigned by the Constitution to the legislature, the executive and the judiciary. Under India's federal structure, with a distribution of legislative authority between the Union government and the States, the fields of legislation and corresponding executive authority are also distributed between the Union and the States. Provisions in the Constitution such as

the fundamental rights chapter (Part III) and the chapter relating to inter-state trade (Part XIII) also circumscribe the authority of the State. These limitations on the power of the State support the notion of 'limited government'. In this sense, the expression 'limited government' would mean that each wing of the State is restricted by provisions of the Constitution and other laws and is required to operate within its legitimate sphere. Exceeding these limits would render the action of the State *ultra vires* the Constitution or a particular law.

40. He further argued that the concept of 'limited government' may also be understood in a much broader and different sense. This notion of a limited government is qua the citizenry as a whole. There are certain things that the State simply cannot do, because the action fundamentally alters the relationship between the citizens and the State. The wholesale collection of biometric data including finger prints and storing it at a central depository per se puts the State in an extremely dominant position in relation to the individual citizen. Biometric data belongs to the concerned individual and the State cannot collect or retain it to be used against the individual or to his or her prejudice in the future. Further the State cannot put itself in a position where it can track an individual and engage in surveillance. The State cannot deprive or withhold the enjoyment of rights and entitlements by an individual or makes such entitlements conditional on a citizen parting with her biometrics. Mr. Divan referred to the judgment of this Court in *State of Madhya Pradesh* v. *Thakur Bharat Singh*[2] where the concept of limited government is highlighted in the following manner:

> "5. ...All executive action which operates to the prejudice of any person must have the authority of law to support it, and the terms of Article 358 do not detract from that rule. Article 358 expressly authorises the State to take legislative or executive action provided such action was competent for the State to make or take, but for the provisions contained in Part III of the Constitution. Article 358 does not purport to invest the State with arbitrary authority to take action to the prejudice of citizens and others: it merely provides that so long as the proclamation of emergency subsists laws may be enacted, and exclusive action may be taken in pursuance of lawful authority, which if the provisions of Article 19 were operative would have been invalid. Our federal structure is founded on certain fundamental principles: (*1*) the sovereignty of the people with limited Government authority i.e. the Government must be conducted in accordance with the will of the majority of the people. The people govern themselves through their representatives, whereas the official agencies of the executive Government possess only such powers as have been conferred upon them by the people; (*2*) There is a distribution of powers between the three organs of the State — legislative, executive and judicial — each organ having some check direct or indirect on the other; and (*3*) the rule of law which includes judicial review of arbitrary executive action. As pointed out by Dicey in his *Introduction to the study of the Law of the Constitution*, 10th Edn., at p. 202, the expression "rule of law" has three meanings, or may be regarded from three different points of view. "It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the Government". At p. 188 Dicey points out:
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> > "In almost every continental community the executive exercises far wider discretionary authority in the matter of arrest, of temporary imprisonment, of expulsion from its territory, and the like, than is either legally claimed or in fact exerted by the Government in England: and a study of European politics now and again reminds English readers that wherever there is discretion there is room for arbitrariness, and that in a republic no less than under a monarchy discretionary authority on the part of the Government must mean insecurity for legal freedom

on the part of its subjects."

We have adopted under our Constitution not the continental system but the British system under which the rule of law prevails. Every Act done by the Government or by its officers must, if it is to operate to the prejudice of any person must, be supported by some legislative authority."

41. Relying on the aforesaid observations, Mr. Divan submitted that the recognition of the distinction between an individual or person and the State is the single most important factor that distinguishes a totalitarian State from one that respects individuals and recognizes their special identity and entitlement to dignity. The Indian Constitution does not establish a totalitarian State but creates a State that is respectful of individual liberty and constitutionally guaranteed freedoms. The Constitution of India is not a charter of servitude.

42. Proceeding further, another submission of Mr. Divan, as noted above, was that Section 139AA which coerces the individuals to part with their personal information was unconstitutional. He submitted that a citizen is entitled to enjoy all these rights including social and civil rights such as the right to receive an education, a scholarship, medical assistance, pensions and benefits under government schemes without having to part with his or her personal biometrics. An individual's biometrics such as finger prints and iris scan are the property and entitlement of that individual and the State cannot coerce an individual or direct him or her to part with biometrics as a condition for the exercise of rights or the enjoyment of entitlements. Every citizen has a basic right to informational self-determination and the state cannot exercise dominion over a citizen's proprietary information either in individual cases or collectively so as to place itself in a position where it can aggregate information and create detailed profiles of individuals or facilitate this process. The Constitution of India is not a charter for a Police State which permits the State to maintain cradle to grave records of the citizenry. No democratic country in the world has devised a system similar to Aadhaar which operates like an electronic leash to tether every citizen from cradle to grave. There can be no question of free consent in situations where an individual is being coerced to part with its biometric information (a) to be eligible for welfare schemes of the State; and/or (b) under the threat of penal consequences. In other words, the State cannot compel a person to part with biometrics as a condition precedent for discharge of the State's constitutional and statutory obligations. In support of his submission that there cannot be coercive measures on the part of the Government to part with such information and it has to be voluntary and based on informed consent, Mr. Divan refered to the following judgments:

(i) *National Legal Services Authority* v. *Union of India*[10]

> "75. Article 21, as already indicated, guarantees the protection of "personal autonomy" of an individual. In *Anuj Garg* v. *Hotel Assn. of India* [(2008) 3 SCC 1] (SCC p. 15, paras 34-35), this Court held that personal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India."

(ii) *Sunil Batra* v. *Delhi Administration*[11]

> "55. And what is "life" in Article 21? In *Kharak Singh case* [AIR 1963 SC 1295 : (1964) 1 SCR 332, 357] Subba Rao, J. quoted Field, J. in *Munn* v. *Illinois* [94 US 113 (1877)] to emphasise the quality of life covered by Article 21:

"Something more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye or the destruction of any other organ of the body through which the soul communicates with the outer world."

A dynamic meaning must attach to life and liberty."

(iii) *Aruna Ramachandra Shanbaug* v. *Union of India*[12]

"25. Mr. T.R. Andhyarujina, learned Senior Counsel whom we had appointed as amicus curiae, in his erudite submissions explained to us the law on the point. He submitted that in general in common law it is the right of every individual to have the control of his own person free from all restraints or interferences of others. Every human being of adult years and sound mind has a right to determine what shall be done with his own body. In the case of medical treatment, for example, a surgeon who performs an operation without the patient's consent commits assault or battery. It follows as a corollary that the patient possesses the right not to consent i.e. to refuse treatment. (In the United States this right is reinforced by a constitutional right of privacy). This is known as the principle of self-determination or informed consent. Mr. Andhyarujina submitted that the principle of self-determination applies when a patient of sound mind requires that life support should be discontinued. The same principle applies where a patient's consent has been expressed at an earlier date before he became unconscious or otherwise incapable of communicating it as by a "living will" or by giving written authority to doctors in anticipation of his incompetent situation.

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93. Rehnquist, C.J. noted that in law even touching of one person by another without consent and without legal justification was a battery, and hence illegal. The notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment. As observed by Cardozo, J. while on the Court of Appeals of New York:

"Every human being of adult years and sound mind has a right to determine what shall be done with his own body, and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."

"Vide *Schloendorff* v. *Society of New York Hospital* [211 NY 125 : 105 NE 92 (1914)], NY at pp. 129-30, NE at p. 93. Thus the informed consent doctrine has become firmly entrenched in American Tort Law. The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment."

43. He, thus, submitted that the right to life covers and extends to a person's right to protect his or her body and identity from harm. The right to life extends to allowing a person to preserve and protect his or her finger prints and iris scan. The strongest and most secure manner of a person protecting this facet of his or her bodily integrity and identity is to retain and not part with finger prints/iris scan. He argued that the right to life under Article 21 permits every person to live life to the fullest and to enjoy freedoms guaranteed as fundamental rights, constitutional rights, statutory rights and common law rights. He also argued that the constitutional validity of a statutory provision must be judged by assessing the effect the impugned provision has on fundamental rights. The effect of the impugned provision is to coerce persons into parting with their finger prints and iris scan and lodging these personal and intimate

aspects of an individual's identity with the State as part of a programme that is in the petitioner's view wholly illegitimate and the validity of which is pending before the Constitution Bench.

44. Expressing his grave fear and misuse of personal information parted with by the citizenry in the form of biometrics i.e. finger prints and iris scan, Mr. Divan made a passionate plea that requirement of enrollment for Aadhaar is designed to facilitate and encourage private sector operators to create applications that depend upon the Aadhaar data base for the purposes of authentication/verification. This would mean that non-governmental, private sector entities such as banks, employers, any point of payment, taxi services, airlines, colleges, schools, movie theatres, clubs, service providers, travel companies, etc. will all utilise the Aadhaar data base and may also insist upon an Aadhaar number or Aadhaar authentication. This would mean that at every stage in an individual's daily activity his or her presence could be traced to a location in real time. One of the purposes of Aadhaar as projected by the respondents is that it will be a single point verification for KYC (Know Your Customer). This is permissible and indeed contemplated by the impugned Act. Given the very poor quality of scrutiny of documents by private enrollers and enrollment agencies (without any governmental supervision) means that the more rigorous KYC process at present being employed by banks and other financial institutions will yield to a system which depends on a much weaker data base. This would eventually imperil the integrity of the financial system and also threaten the economic sovereignty of the nation. According to him, Aadhaar Act does not serve as an identity as incorrectly projected by the respondents but serves as a method of identification. Every citizen-state and citizen-service provider interaction requiring identification is sought to be captured and retained by the government at a central base and a whole ecology developed that would require reference to this central data base on multiple occasions in course of the day. He argued that this exercise of enrollment impermissibly creates the foundation for real time, continuous and pervasive identification of citizens in breach of the freedoms guaranteed under the Constitution.

45. Another submission of Mr. Divan was that object behind Section 139AA of the Act was clearly discriminatory inasmuch as it creates two classes: one class of those persons who volunteer to enrol themselves under Aadhaar Scheme and provide the particulars in their income-tax returns and second category of those who refuse to do so. This provision by laying down adverse consequences for those who do not enrol becomes discriminatory *qua* that class and, therefore, is violative of Article 14 of the Constitution. Another limb of his submission was that it also creates an artificial class of those who object to such a provision of enrollment under Aadhaar. According to him, this would be violative of equality clause enshrined in Article 14 of the Constitution and in support of this submission, he relied upon the judgment of this Court in *Nagpur Improvement Trust* v. *Vithal Rao*[13]. Paras 21, 22 and 26 reads as under:

> "21. The first point which was raised was: whether it is the State which is the acquiring authority or it is the Improvement Trust which is the acquiring authority, under the Improvement Act. It seems to us that it is quite clear, especially in view of Section 17-A as inserted by para 6 of the Schedule, that the acquisition will be by the Government and it is only on payment of the cost of acquisition to the Government that the lands vest in the Trust. It is true that the acquisition is for the Trust and may be at its instance, but nevertheless the acquisition is by the Government.
>
> 22. If this is so, then it is quite clear that the Government can acquire for a housing accommodation scheme either under the Land Acquisition Act or under the Improvement Act. If this is so, it enables the State Government to discriminate

between one owner equally situated from another owner.

xxx xxx xxx

26. It is now well-settled that the State can make a reasonable classification for the purpose of legislation. It is equally well-settled that the classification in order to be reasonable must satisfy two tests: (*i*) the classification must be founded on intelligible differentia and (*ii*) the differentia must have a rational relation with the object sought to be achieved by the legislation in question. In this connection it must be borne in mind that the object itself should be lawful. The object itself cannot be discriminatory, for otherwise, for instance, if the object is to discriminate against one section of the minority the discrimination cannot be justified on the ground that there is a reasonable classification because it has rational relation to the object sought to be achieved.

46. He also relied upon the judgment in the case of *Subramanian Swamy* v. *Director, Central Bureau of Investigation*[14]. Paras 58 and 59 reads as under:

"58. The Constitution permits the State to determine, by the process of classification, what should be regarded as a class for purposes of legislation and in relation to law enacted on a particular subject. There is bound to be some degree of inequality when there is segregation of one class from the other. However, such segregation must be rational and not artificial or evasive. In other words, the classification must not only be based on some qualities or characteristics, which are to be found in all persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. Differentia which is the basis of classification must be sound and must have reasonable relation to the object of the legislation. If the object itself is discriminatory, then explanation that classification is reasonable having rational relation to the object sought to be achieved is immaterial.

59. It seems to us that classification which is made in Section 6-A on the basis of status in government service is not permissible under Article 14 as it defeats the purpose of finding prima facie truth into the allegations of graft, which amount to an offence under the PC Act, 1988. Can there be sound differentiation between corrupt public servants based on their status? Surely not, because irrespective of their status or position, corrupt public servants are corrupters of public power. The corrupt public servants, whether high or low, are birds of the same feather and must be confronted with the process of investigation and inquiry equally. Based on the position or status in service, no distinction can be made between public servants against whom there are allegations amounting to an offence under the PC Act, 1988."

47. In fine, submission of Mr. Divan was that save and except by "reading down", section 139AA is unworkable. This is because Aadhaar by its very design and by its statute is "voluntary" and creates a right in favour of a resident without imposing any duty. There is no compulsion under the Aadhaar Act to enroll or obtain a number. If a person chooses not to enroll, at the highest, in terms of the Aadhaar Act, he or she may be denied access to certain benefits and services funded through the Consolidated Fund of India. When the Aadhaar enrollment procedure is supposedly based on informed free consent and is voluntary a person cannot be compelled by another law to waive free consent so as to alter the voluntary nature of enrollment that is engrafted in the parent statute. The right of a resident under the parent Act cannot be converted into a duty so long as the provisions of the Aadhaar Act cannot be converted into a duty so long as the provisions of the Aadhaar Act remain as they are. Argument was that Section 139AA be read down to hold that it is only voluntary provision by taking out the sting of mandatoriness contained therein and there is no compulsion on any person to give Aadhaar number.

48. We may mention at this stage itself that on conclusion of his arguments, Mr. Divan was put a specific query that most of the arguments presented by him endeavoured to project aesthetics of law and jurisprudence which had the shades of 'Right to Privacy' jurisprudence which could not be gone into by this Bench as this very aspect was already referred to the Constitution Bench. Mr. Divan was candid in accepting this fact and his submission was that in these circumstances, the option for this Bench was to stay the operation of proviso to sub-section (2) of Section 139AA of the Act till the decision is rendered by the Constitution Bench.

49. Mr. Salman Khurshid, learned senior counsel who appeared in Writ Petition (Civil) No. 247 of 2017, while adopting the arguments of Mr. Datar and Mr. Divan, made an additional submission, invoking the principle of right to live with dignity which, according to him, was somewhat different from the Right to Privacy. He submitted that although dignity inevitably includes privacy, the former has several other dimensions which need to be explored as well. In his submissions, the test to identify whether certain data collected about individuals is intrusive or merely expansive is to consider whether it causes embarrassment, indignity or invasion of privacy. Thus, the concept of dignity is quite distinct from that of privacy. Privacy is a conditional concept. One has it only to the extent that one's circumstances allow for it, as a matter of fact and law. While it is widely accepted that a situation may occur where a person may not have any Right to Privacy whatsoever, dignity is an inherent possession of every person, regardless of circumstance. In that sense, Dignity is an inherent dimension of equality, the basis of John Rawls 'Theory of Justice'. The Social Contract theory propounded by Rousseau remains the ground on which John Rawls developed the model of the Original Position in which the contours of the compact are conceived. Anything that reduces the personality of the participant, such as diluting the human element and substituting it with a number or biometric data, virtually destroys the model. Dignity is an immutable value, held in equal measure at all times by all people, a quality privacy does not share. No court has ever held that a person can be stripped entirely of hir/her dignity. The concept of dignity is deeper than that of privacy and its boundaries do not depend upon the circumstance of any individual and thus the State cannot legitimately fully infringe upon it. He pointed out that in *M. Nagaraj* v. *Union of India*[15], this Court has, thus, elucidated the concept of Right to Dignity in the following manner:

> "20. ... This Court has in numerous cases deduced fundamental features which are not specifically mentioned in Part III on the principle that certain unarticulated rights are implicit in the enumerated guarantees.
>
> xxx xxx xxx
>
> 26. It is the duty of the State not only to protect the human dignity but to facilitate it by taking positive steps in that direction. No exact definition of human dignity exists. It refers to the intrinsic value of every human being, which is to be respected. It cannot be taken away. It cannot give (*sic* be given). It simply is. Every human being has dignity by virtue of his existence. The constitutional courts in Germany, therefore, see human dignity as a fundamental principle within the system of the basic rights. This is how the doctrine of basic structure stands evolved under the German Constitution and by interpretation given to the concept by the constitutional courts."

50. After explaining the aforesaid distinction between the two concepts, Mr. Khurshid argued that the impugned provision in the Income Tax Act was violative of right to live with dignity guaranteed under Article 21 of the Constitution. He submitted that Right to Life and Liberty mentioned in Article 21 of the Constitution encompasses within its right to live with dignity as has been held in catena of cases by this Court. He explained in detail as to how the concept of dignity was dealt with by different

jurists from time to time including Kant who identified dignity with autonomy and Dworkin who exemplified the doctrine of dignity on the conception of living well, which itself is based on two principles of dignity, namely, self respect and authenticity. In this sense, he submitted that living with dignity involves giving importance to living our life well and acting independently from the personal sense of character and commitment to standards and ideals we stand for. The mandatory requirement of Aadhaar card makes an unwarranted intrusion in the importance we give to our bodily integrity in living our life well and compels human beings to express themselves the way the State wants. He also submitted that the features relevant for upholding the dignity of a human being will be severely compromised with when the data are cross-referenced with data relating to other spheres of life and are disclosed to third parties through different data collected for varied reasons. This would take place without the knowledge and consent of the poor assessees who are apparently required to mandatory obtain the Aadhaar card only for the purposes of payment of taxes.

51. Mr. Khurshid also raised doubts and fears about the unauthorised disclosure of the information given by these persons who enroll themselves under Aadhaar and submitted that in the absence of proper mechanism in place to check unauthorised disclosure, the impugned provision of making Aadhaar card for filing tax returns cannot be said to be consistent with the democratic ideals. Mr. Khurshid also submitted that there was no compelling state interests in having such a provision introducing compulsive element and depriving from erstwhile voluntary nature of Aadhaar scheme. According to him, the 'proportionality of means' concept is an essential one since integrating data beyond what is really necessary for the stated purpose is clearly unconstitutional. He submitted that in light of the decision in the case of *Gobind* v. *State of Madhya Pradesh*[16], which has been the position of this Court since the past forty-two years and has been cited with approval often, it is humbly submitted that the State has the onerous burden of justifying the impugned mandatory provision. The 'compelling state interest' justification is only one aspect of the broader 'strict scrutiny' test, which was applied by this Court in *Anuj Garg* v. *Hotel Association of India*[17]. The other essential facet is to demonstrate 'narrow tailoring', i.e., that the State must demonstrate that even if a compelling interest exists, it has adopted a method that will infringe in the narrowest possible manner upon individual rights. He submitted that neither is there any compelling State interest warranting such a harsh mandatory provision, nor has it been narrowly tailored to meet the object, if any.

52. In this hue, he also submitted that Section 139AA of the Act violates the Rule of Law. Elaborating his argument, he submitted that a legal system which in general observes the rule of law treats its people as persons, in the sense that it attempts to guide their behaviour through affecting the circumstances of their action. It, thus, presupposes that they are rational autonomous creatures and attempts to affect their actions and habits by affecting their deliberations. It satisfies men's craving for reasonable certainty of form as well as substance, and for dignity of process as well as dignity of result. On the other hand, when the rule of law is violated, it may be either in the form of leading to uncertainty or it may lead to frustrated and disappointed expectations. It leads to the first when the law does not enable people to foresee future developments or to form definite expectations. It leads to frustrated expectations when the appearance of stability and certainty which encourages people to rely and plan on the basis of the existing law is shattered by retroactive law-making or by preventing proper law-enforcement, etc. The evils of frustrated expectations are greater. Quite apart from the concrete harm they cause they also offend dignity in expressing disrespect for people's autonomy. The law in such cases encourages autonomous action only in order to frustrate its purpose. When such frustration is the

result of human action or the result of the activities of social institutions then it expresses disrespect. Often it is analogous to entrapment: one is encouraged innocently to rely on the law and then that assurance is withdrawn and one's very reliance is turned into a cause of harm to one. Just as in the instant case, the impugned provision came into force when the order of the Court that Aadhaar card is not mandatory, still continues to operate.

53. In the alternative, another submission of Mr. Khurshid was that Section 139AA was retrospective in nature as per proviso to sub-section (2) thereof. As per the said proviso, on failure to give Aadhaar number, the consequence was not only to render the PAN Card invalid prospectively but from the initial date of issuance of PAN Card in view of the expression 'as if the person had not applied for Permanent Account Number' which would meant that PAN Card would be invalidated by rendering the same *void ab initio* i.e. from retrospective effect. Such a retrospective effect, according to him, was violative of Article 20(1) of the Constitution. Further, retrospective operation is not permissible without separate objects for such operations as held in *Dayawati* v. *Inderjit*[18]. In conclusion, learned senior counsel submitted that the law regarding mandatory requirement of Aadhaar card is a hasty piece of legislation without much thought going into it. It is submitted that the Aadhaar card cannot be made mandatory for filing tax returns with such far-reaching consequences for non-compliance, unless and until suitable measures are put in place to ensure that the dignity of the assessees is not compromised with. The generalisation, centralisation and disclosure of biometric information, however, accidental it might be, has to be effectively controlled and mechanisms have to be put in place to inquire and penalise those found guilty of disclosing such information. The need to do so is extremely crucial in view of the fact that biometric systems may be bypassed, hacked, or even fail. Unless the same is done, the identity of the citizens will be reduced to a collection of instrumentalised markers. Further, the organisations and authorities allowed to conduct it should be strictly defined. There has to be a strict control over any systematic use of common identifiers. No such re-grouping of data can be allowed as could lead to the use of biometrics for exclusion of vulnerable groups. Brown considers surveillance as both a discursive and a material practice that reifies bodies around divisive lines. Surveillance of certain communities has been both social as well as political norm. He further submitted that this Court cannot lose sight of the fact that the data collected under the impugned provision may be used to carry out discriminatory research and sort subjects into groups for specific reasons. The fact that the impugned provision creates an apprehension in the minds of the people, legitimate and reasonable enough with no preventive mechanism in place, is in itself a violation of the right to life and personal liberty as enshrined under the Constitution.

54. Mr. Anando Mukherjee, learned counsel, appeared in Writ Petition (Civil) No. 304 of 2017, while reiterating the submissions of earlier counsel, argued that Section 139AA was confused, self-destructive and self-defeating provision for the reason that on the one hand, it had an effect of making enrollment into Aadhaar mandatory, but, on the other hand, by virtue of the explanation contained in the provision itself, it is kept voluntary and as a matter of right for the same set of individuals and for the purposes of Section 139AA. He also submitted that there was a conflict between Section 139AA of the Act and Section 29 of Aadhaar Act inasmuch as Section 29 puts a blanket embargo on using the core biometric information, collected or created under the Aadhaar Act for any purpose other than generation of Aadhaar numbers and authentication under the Aadhaar Act. Mr. Mukherjee went to the extent of describing the impugned provision as colourable exercise of power primarily on the ground that when Aadhaar Act is voluntary in nature, there was no question of making this very provision mandatory by virtue of Section 139AA of the Act.

55. Appearing for Union of India, Mr. Mukul Rohatgi, learned Attorney General for India, put stiff resistance to the submissions advanced on behalf of the petitioners. In a bid to torpedo and pulverise the arguments as set forth on the side of the petitioners, the learned Attorney pyramid his arguments in the following style:

56. In the first, Mr. Rohatgi made few preliminary remarks. First such submission was that many contentions advanced by the counsel for the petitioners touch upon the question of Right to Privacy which had already been referred to the Constitution Bench and, therefore, those aspects were not required to be dealt with. In this behalf, he specifically referred to the following observations of this Court in its order dated August 11, 2015, which were made by the three Judge Bench in Writ Petition (Civil) No. 494 of 2012:

> "At the same time, we are also of the opinion that the institutional integrity and judicial discipline require that pronouncement made by larger Benches of this Court cannot be ignored by the smaller Benches without appropriately explaining the reasons for not following the pronouncements made by such larger Benches. With due respect to all the learned Judges who rendered the subsequent judgments - where right to privacy is asserted or referred to their Lordships concern for the liberty of human beings, we are of the humble opinion that there appears to be certain amount of apparent unresolved contradiction in the law declared by this Court."

57. Notwithstanding these preliminary remarks, he rebutted the said argument based on Article 21, including Right to Privacy, by raising a plea that Right to Privacy/Personal Autonomy/Bodily Integrity is not absolute. He referred to the judgment of the United States Supreme Court in *Roe* v. *Wade*[19] wherein it was held:

> "The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognise an unlimited right of this kind in the past."

58. He also relied upon the judgment of this Court in *Sharda* v. *Dharmpal*[20] where the Court held that a matrimonial court has the power to order a person to undergo medical test. Passing of such an order by the court would not be in violation of the right to personal liberty under Article 21 of the Indian Constitution.

59. His second preliminary submission was that insofar as challenge to the validity of Section 139AA on other grounds is concerned, it is to be kept in mind that the constitutional validity of a statute could be challenged only on two grounds, i.e. the Legislature enacting the law was not competent to enact that particular law or such a law is violative of any of the provisions of the Constitution. In support, he referred to the various judgments of this Court.

60. He, thus, submitted that no third ground was available to any of the petitioners to challenge the constitutional validity of a legislative enactment. According to him, the principle proportionality should not be read into Article 14 of the Constitution, while taking support from the judgment in *K.T. Plantation Private Limited* v. *State of Karnataka*[21], wherein it is held that plea of unreasonableness, arbitrariness, proportionality, etc. always raises an element of subjectivity on which a court cannot strike down a statute or a statutory provision.

61. Third introductory submission of the learned Attorney General was that the scope of judicial review in a fiscal statute was very limited and Section 139AA of the Act, being a part of fiscal statute, following parameters laid down in *State of Madhya Pradesh* v. *Rakesh Kohli*[22] had to be kept in mind:

> "32. While dealing with constitutional validity of a taxation law enacted by

Parliament or State Legislature, the court must have regard to the following principles:

(i) there is always presumption in favour of constitutionality of a law made by Parliament or a State Legislature,

(ii) no enactment can be struck down by just saying that it is arbitrary or unreasonable or irrational but some constitutional infirmity has to be found,

(iii) the court is not concerned with the wisdom or unwisdom, the justice or injustice of the law as Parliament and State Legislatures are supposed to be alive to the needs of the people whom they represent and they are the best judge of the community by whose suffrage they come into existence,

(iv) hardship is not relevant in pronouncing on the constitutional validity of a fiscal statute or economic law, and

(v) in the field of taxation, the legislature enjoys greater latitude for classification...".

62. In this hue, he also argued that the State enjoys the widest latitude where measure of economic regulations are concerned (See - *Secretary to Government of Madras* v. *P.R. Sriramulu*[23], paragraph 15) and that *mala fides* cannot be attributed to the Parliament, as held in *G.C. Kanungo* v. *State of Orissa*[24], (paragraph 11). Also, the courts approached the issue with the presumption of constitutionality in mind and that Legislature intends and correctly appreciates the need of its own people, as held in *Mohd. Hanif Quareshi* v. *State of Bihar*[25] (paragraph 15).

63. On merits, the argument of Mr. Rohatgi was that once the aforesaid basic parameters are kept in mind, the impugned provision passes the muster of constitutionality. Adverting to the issue of legislative competence, he referred to Article 246 and 248 of the Constitution as well as Entry 82 and Entry 97 of List-I of Schedule-VII of the Constitution which empowers the Parliament to legislate on the subject pertaining to income-tax. Therefore, it could not be said that the impugned provision made was beyond the competence of the Parliament. He also submitted that in any case residuary power lies with the Parliament and this power to legislate is plenary, as held in *Synthetics and Chemicals Ltd.* v. *State of U.P.*[26]

"56. On behalf of the State both Mr. Trivedi and Mr. Yogeshwar Prasad contended that regulatory power of the State was there and in order to regulate it was possible to impose certain disincentives in the form of fees or levies. Imposition of these imposts as part of regulatory process is permissible, it was submitted. Our attention was drawn to the various decisions where by virtue of "police power" in respect of alcohol the State has imposed such impositions. Though one would not be justified in adverting to any police power, it is possible to conceive sovereign power and on that sovereign power to have the power of regulation to impose such conditions so as to ensure that the regulations are obeyed and complied with. We would not like, however, to embark upon any theory of police power because the Indian Constitution does not recognise police power as such. But we must recognise the exercise of sovereign power which gives the States sufficient authority to enact any law subject to the limitations of the Constitution to discharge its functions. Hence, the Indian Constitution as a sovereign State has power to legislate on all branches except to the limitation as to the division of powers between the Centre and the States and also subject to the fundamental rights guaranteed under the Constitution. The Indian State, between the Centre and the States, has sovereign power. The sovereign power is plenary and inherent in every sovereign State to do all things which promote the health, peace, morals, education and good order of the people. Sovereignty is difficult to define. This power of sovereignty is, however, subject to constitutional limitations. This power, according to some constitutional

authorities, is to the public what necessity is to the individual. Right to tax or levy imposts must be in accordance with the provisions of the Constitution."

64. Rebutting the argument of Mr. Datar that by making the impugned provision mandatory the Legislature had acted contrary to the judgments of this Court, Mr. Rohatgi argued that this argument was devoid of any merit on various counts: First, there was no judgment of this Court and the orders referred were only interim orders. Secondly, in any case, those orders were passed at a time when Aadhaar was being implemented as a scheme in administrative/executive domain and the Court was considering the validity of Aadhaar scheme in that hue/background. Those orders have not been passed in the context of examining the validity of any legislative measure. Thirdly, no final view is taken in the form of any judgment that Aadhaar is unconstitutional and, therefore, there is no basis in existence which was required to be removed. Fourthly, the Parliament was competent to pass the law and provide statutory framework to give legislative backing to Aadhaar in the absence of any such law which existed at that time. He, thus, submitted that there was no question of curing the alleged basis of judgment/interim orders by legislation. He specifically relied upon the following passage from the judgment in the case of *Goa Foundation* v. *State of Goa*[27]:

> "24. The principles on which first question would require to be answered are not in doubt. The power to invalidate a legislative or executive act lies with the Court. A judicial pronouncement, either declaratory or conferring rights on the citizens cannot be set at naught by a subsequent legislative act for that would amount to an encroachment on the judicial powers. However, the legislature would be competent to pass an amending or a validating act, if deemed fit, with retrospective effect removing the basis of the decision of the Court. Even in such a situation the courts may not approve a retrospective deprivation of accrued rights arising from a judgment by means of a subsequent legislation (*Madan Mohan Pathak* v. *Union of India*). However, where the Court's judgment is purely declaratory, the courts will lean in support of the legislative power to remove the basis of a court judgment even retrospectively, paving the way for a restoration of the status quo ante. Though the consequence may appear to be an exercise to overcome the judicial pronouncement it is so only at first blush; a closer scrutiny would confer legitimacy on such an exercise as the same is a normal adjunct of the legislative power. The whole exercise is one of viewing the different spheres of jurisdiction exercised by the two bodies i.e. the judiciary and the legislature. The balancing act, delicate as it is, to the constitutional scheme is guided by the well-defined values which have found succinct manifestation in the views of this Court in Bakhtawar Trust."

65. Mr. Rohatgi thereafter read extensively from the counter affidavit filed on behalf of the Union of India detailing the rational and objective behind introduction of Section 139AA of the Act. He submitted that the provision aims to achieve, *inter alia*, the following objectives:

(i) This provision was introduced to tackle the problem of multiple PAN cards to same individuals and PAN cards in the name of fictitious individuals are common medium of money laundering, tax evasion, creation and channelling of black money. PAN numbers in name of firm or fictitious persons as directors or shareholders are used to create layers of shell companies through which the aforesaid activities are done. A de-duplication exercise was done in the year 2006 and a large number of PAN numbers were found to be duplicate. The problem of some persons fraudulently obtaining multiple PANs and using them for making illegal transactions still exists. Over all 11.35 lakh cases of duplicate PAN/fraudulent PAN have been detected and accordingly such PANs have been deleted/deactivated. Out of this, around 10.52 lakh cases pertain to individual

assessees. Total number of Aadhaar for individuals exceeds 113 crores whereas total number of PAN for individuals is around 29 crore. Therefore, whereas the Aadhaar Act applies to the entire population, the Income Tax Act applies to a much smaller sub-set of the population, i.e. the tax payers. In order to ensure *One Pan to One Person*, Aadhaar can be the sole criterion for allotment of PAN to individuals only after all existing PAN are seeded with Aadhaar and quoting of Aadhaar is mandated for new PAN applications.

Counter affidavit filed by the Union of India also gives the following instances of misuse of PAN:

(a) In NSDL scame of 2006, about one lakh bogus bank and demat accounts were opened through use of PANs. The real PAN owners were not aware of these accounts.

(b) As Banks progressively started insisting on PANs for opening of bank accounts, unscrupulous operators managed multiple PANs for providing entries and operating undisclosed accounts for making financial transactions.

(c) Entry operators manage a large number of shell companies using duplicate PANs or PANs issued in the name of dummy directors and name lenders. As the persons involved as bogus directors are usually the same set of persons, linkage with Aadhaar would prevent such misuse. Further, it will also be expedient for the Enforcement agencies to identify and red flag such misuses in future.

(d) Cases have also been found where multiple PANs are acquired by a single entity by dubious means and used for raising loans from different banks. In one such case at Ludhiana, multiple PANs were found acquired by a person in his individual name as well as in the name of his firms by dubious means. During investigation, he admitted to have acquired multiple PANs for raising multiple loans from banks and to avoid adverse CIBIL information. Prosecution has been launched by the Income Tax Department in this case u/s. 277A, 278, 278B of the Act in addition

(ii) To tackle the problem of black money, Mr. Rohatgi pointed out that the Second Report of the Special Investigation Team (SIT) on black money, headed by Justice M.B. Shah (Retd.), after observing the menace of corruption and black money, recommended as follows:

"At present, for entering into financial/business transactions, persons have option to quote their PAN or UID or passport number or driving license or any other proof of identity. However, there is no mechanism/system at present to connect the data available with each of these independent proofs of ID. It is suggested that these databases be interconnected. This would assist in identifying multiple transactions by one person with different IDs."

The SIT in its Third Report has recommended the establishment of a Central KYC Registry. The rational for the SIT recommendations was to prove a verifiable and authenticable identity for all individuals and Aadhaar provides a mechanism to serve that purpose in a federated architecture without aggregating all the information at one place.

The Committee headed by the Chairman, CBDT on 'Measures to tackle black money in India and abroad' reveals that various authorities are dealing with the menace of money laundering being done to evade taxes under the garb of shell companies by the persons who hold multiple bogus PAN numbers under different names or variations of their names, providing accommodation entries to various companies and persons to evade taxes and introduce undisclosed and unaccounted income of those persons into their companies as share

applications or loans and advances or booking fake expenses. These are tax frauds and devices which are causing loss to the revenue to the tune of thousands of crores.

(iii) Another objective is to curb the menace of shell companies. It is submitted in this regard that PAN is a basis of all the requirements in the process of incorporation of a company. Even an artificial juridical person like a company is granted PAN. It is required as an ID proof for incorporation of a company, applying for DIN, digital signature etc. PAN is also required for opening a bank account in the name of a company or individuals. Basic documents required for obtaining a PAN are ID proof and address proof. It has been observed that these documents which are a basis of issuance of PAN could easily be forged and, therefore, PAN cards issued on the basis of such forged documents cannot be genuine and it can be used for various financial frauds/crime. Aadhaar will ensure that there is no duplication of identity as biometric will not allow that. If at the time of opening of bank accounts itself, the more robust identity proof like Aadhaar had been used in place of PAN, the menace of mushrooming of non-descript/shell/jamakharchi/bogus companies would have been prevented. There is involvement of natural person in the complex web of shell companies only at the initial stage when the shareholders subscribe to the share capital of the shell company. After that may layers are created because there is company to company transaction and much more complex structure of shell company compromising the financial integration of nation is formed which makes it almost impossible to identify the real beneficiary (natural person) involved in these shell companies. These shell companies have been used for purpose of money laundering at a large scale. The fake PAN cards have facilitated the enormous growth of shell companies which were being used for layering of funds and illegal transfer of such funds to some other companies/persons or parked abroad in the guise of remittances against import. The share capital of these shell companies are subscribed by fake shareholders through numerous bank accounts opened with the use of fake PAN cards at the initial stage.

(iv) According to the respondents, this provision will help in widening of tax base. It was pointed out that more than 113 crore people have registered themselves under Aadhaar. Adults coverage of Aadhaar is more than 99%. Aadhaar being a unique identification, the problem of bogus or duplicate PANs can be dealt with in a more systematic and foolproof manner.

According to the respondent, in fact, it has already shown results as Aadhaar has led to weeding out duplicate and fakes in many welfare programmes such as PDS, MNREGS, LPG Pahal, Old Age pension, scholarships etc. during the last two years and it has led to savings of approximately Rs. 49,000 crores to the exchequer.

66. Mr. Rohatgi also referred to that portions of the counter affidavit which narrates the following benefits Aadhaar seeding in PAN database:

(a) **Permanent Account Number (PAN)** - PAN is a ten-digit alpha-numeric number allotted by the Income Tax Department to any 'person' who applies for it or to whom the department allots the number without an application. One PAN for one person is the guiding principle for allotment of PAN. PAN acts as the identifier of taxable entity and aggregator of all financial transactions undertaken by the taxable entity i.e. 'person'.

(b) **Legal provisions relating to PAN** - PAN is the key or identifier of all computerized records relating to the taxpayer. The requirement for obtaining of PAN is mandated through Section 139A of the Act. The procedure for application for PAN is prescribed in Rule 114 of the Rules. The forms prescribed for PAN

application are 49A and 49AA for Indian and Foreign Citizens/Entities. Quoting of PAN has been mandated for certain transactions above specified threshold value in Rule 114B of the Rules.

(c) **Uniqueness of PAN -** For achieving the objective of one PAN to one assessee, it is required to maintain uniqueness of PAN. The uniqueness of PAN is achieved by conducting a de-duplication check on all already existing allotted PAN against the data furnished by new applicant. Under the existing system of PAN only demographic data is captured. De-duplication process is carried out using a Phonetic Algorithm whereby a Phonetic PAN (PPAN) is created in respect of each applicant using the data of applicant's name, father's name, date of birth, gender and status. By comparison of newly generated PPAN with existing set of PPANs of all assessees duplicate check is carried out and it is ensured that same person does not acquire multiple PANs or one PAN is not allotted to multiple persons. Due to prevalence of common names and large number of PAN holders, the demographic way of de-duplication is not foolproof. Many instances are found where multiple PANs have been allotted to one person or one PAN has been allotted to multiple persons despite the application of above-mentioned de-duplication process. While allotment of multiple PAN to one person has the risk of diversion of income of person into several PANs resulting in evasion of tax, the allotment of same PAN to multiple persons results in wrong aggregation and assessment of incomes of several persons as one taxable entity represented by single PAN.

(d) Presently verification of original documents in only 0.2% cases (200 out of 1,00,000 PAN applications) is done on a random basis which is quite less. In the case of Aadhaar, 100% verification is possible due to availability of on-line Aadhaar authentication service provided by the UIDAI. Aadhaar seeding in PAN database will make PAN allotment process more robust.

(e) Seeding of Aadhaar number into PAN database will allow a robust way of de-duplication as Aadhaar number is de-duplicated using biometric attributes of fingerprints and iris images. The instance of a duplicate Aadhaar is almost non-existent. Further seeking of Aadhaar will allow the Income Tax Department to weed out any undetected duplicate PANs. It will also facilitate resolution of cases of one PAN allotted to multiple persons.

67. After stating the aforesaid purpose, rational and benefits, the learned Attorney General submitted that the main provision is not violative of any constitutional rights of the petitioners. According to him, the provision was not discriminatory at all inasmuch as it was passed on reasonable classification, the two classes being tax payers and non tax payers. He also submitted that it was totally misconceived that this provision had no rational nexus with the objective sought to be achieved in view of the various objectives and benefits which were sought to be achieved by seeding Aadhaar with PAN. Mr. Rohatgi also referred to various orders and judgments of this Court whereunder use of Aadhaar was endorsed, encouraged or even directed. Following instances are cited:

68. The importance and utility of Aadhaar for delivery of public services like PDS, curbing bogus admissions in schools and verification of mobile number subscribers has not only been upheld but endorsed and recommended by this Court.

69. This Court in the case of *PUCL* v. *Union of India*[28] has approved the recommendations of the High Powered Committee headed by Justice D.P. Wadhwa, which recommended linking of Aadhaar with PDS and encouraged State Governments to adopt the same.

70. This Court in *State of Kerala* v. *President, Parents Teachers Association, SNVUP*[29] has directed use of Aadhaar for checking bogus admissions in schools with

the following observations:

> "18. We are, however, inclined to give a direction to the Education Department, State of Kerala to forthwith give effect to a circular dated 12.10.2011 to issue UID Card to all the school children and follow the guidelines and directions contained in their circular. Needless to say, the Government can always adopt, in future, better scientific methods to curb such types of bogus admissions in various aided schools."

71. While monitoring the PILs relating to night shelters for the homeless and the right to food through the public distribution system, this Court has lauded and complimented the efforts of the State Governments for *inter alia* carrying out bio-metric identification of the head of family of each household to eliminate fictitious, bogus and ineligible BPL/AAY household cards.

72. A two Judge Bench of this court in *People's Union for Civil Liberties (PDS Matter)* v. *Union of India*[30] has held that computerisation is going to help the public distribution system in the country in a big way and encouraged and endorsed the digitisation of database including bio-metric identification of the beneficiaries. In fact, this Court had requested Mr. Nandan Nilekani to suggest ways in which the computerisation process of PDS can be expedited.

73. In the case of *People's Union for Civil Liberties* v. *Union of India*[31], this Court has also endorsed bio-metric identification of homeless persons so that the benefits like supply of food and kerosene oil available to persons who are below poverty line can be extended to the correct beneficiaries.

74. In the case of *Lokniti Foundation* v. *Union of India*[32], this Court has disposed of the writ petition while approving the Aadhaar based verification of existing and new mobile number subscribers and upon being satisfied that an effective process has been evolved to ensure identity verification.

75. Mr. Sengupta, learned counsel arguing on behalf of UIDAI, made additional submissions specifically answering the doctrine of proportionality argument advanced by Mr. Datar as well as on the aspect of informational self-determination. His submissions in this behalf were that proportionality should not be read into Article 14 of the Constitution and in any case no proportionality or other Article 14 violation had been made out in the instant case. He also argued that there is no absolute right to informational self-determination; to the extent such right may exist it is part of the Right to Privacy whose very existence contours is before the Constitution Bench of this Court.

76. Adverting to the doctrine of proportionality, he referred to the judgments of this Court in ***Modern Dental College and Research Centre***[33] wherein this doctrine is explained and applied and submitted that the doctrine is applied only in the context of Article 19(1)(g) and not Article 14 of the Constitution. He pointed out that proportionality is not the governing law even in the United Kingdom for claims analogous to Article 14 of the Constitution. His passionate submission was that proportionality supplanting traditional review in European Court of Human Rights cases and not remaining applicable in traditional judicial review claims has caused immense confusion in British pubic law. Narrating the structure of Article 19, submission of Mr. Sengupta was that freedoms which were enlisted under Article 19 (1) were not the absolute freedoms and they were subject to reasonable restrictions, as provided under sub-article (2) to (6) of Article 19 itself. It is because of this reason, while examining as to whether a particular measure violated any of the freedoms or was a reasonable restriction, balancing exercise was to be done by the courts and this balancing exercise brings the element of proportionality. However, this was not envisaged in Article 14 at all.

77. Coming to the impugned provision and referring to the penal consequences

provided in proviso to Section 139AA(2), he argued that the test of whether penalty is proportionate is not the same as the doctrine of proportionality. Proportionate penalty is an incident of arbitrariness whereas there cannot be any arbitrariness *qua* a statute. He also submitted that on facts penalty provided in the impugned provision is deemed to be the same as that for not filing income tax return with valid PAN. He also argued that there was no violation of Article 14 inasmuch as classification had a reasonable nexus with the object enshrined in the impugned provision. It was open to the Legislature to determine decrease of harm and act accordingly and the Legislature does not have to tackle problem 100% for it to have a rational nexus. Since individual assessees are prone to the problem and financial frauds using fake PAN, whether individually or in the guise of legal persons, Aadhaar aims at tackling problem which exhibited a rational nexus with the object. According to Mr. Sengupta, there was no discriminatory object inasmuch as the object is to weed out duplicate PANs that allow financial and tax fraud. Therefore, the provision is not discriminatory in nature.

78. Dealing with the argument of right to informational self-determination, the learned counsel submitted that as a matter of current practice in India, no absolute right to determine what information about oneself one wants to disclose; several pieces of personal information are required by law. The perils of comparative law in merely transplanting from German law; the need to develop an Indian understanding of privacy and self-determination in the Indian context. Even in German law, the judgment quoted by the petitioner does not demonstrate an untrammelled Right to Privacy or information self-determination. The world over, information over oneself is the most critical element of privacy; the contours of which are to be determined by a Constitution Bench.

A Caveat

79. Before we enter into the discussion and weigh the merits of arguments addressed on both sides, one aspect needs to be made absolutely clear, though it has been hinted earlier as well. Conscious of the fact that challenge to Aadhaar scheme/legislation on the ground that it was violative of Article 21 of the Constitution is pending before the Constitution Bench and, therefore, this Bench could not have decided that issue, counsel for the petitioners had submitted that they would not be pressing the issue of Right to Privacy. Notwithstanding the same, it was argued by Mr. Divan, though in the process Mr. Divan emphasised that he was touching upon other facets of Article 21. Likewise, Mr. Salman Khurshid while arguing that the impugned provision was violative of Article 21, based his submission on Right to Human Dignity as a facet of Article 21. He also emphasised that the concept of human dignity was different from Right to Privacy. We have taken note of these arguments above. However, we feel all these aspects argued by the petitioners overlap with privacy issues as different aspects of Article 21 of the Constitution. Right to Let Alone has the shades of Right to Privacy and it is so held by the Court in *R. Rajagopal* v. *State of Tamil Nadu*[34]:

> "26. We may now summarise the broad principles flowing from the above discussion:
>
> (1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent — whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or

raises a controversy.

(2) The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency [Article 19(2)] an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicised in press/media.

(3) There is yet another exception to the rule in (1) above — indeed, this is not an exception but an independent rule. In the case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made (by the defendant) with reckless disregard for truth. In such a case, it would be enough for the defendant (member of the press or media) to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false *and* actuated by malice or personal animosity, the defendant would have no defence and would be liable for damages. It is equally obvious that in matters not relevant to the discharge of his duties, the public official enjoys the same protection as any other citizen, as explained in (1) and (2) above. It needs no reiteration that judiciary, which is protected by the power to punish for contempt of court and Parliament and legislatures protected as their privileges are by Articles 105 and 104 respectively of the Constitution of India, represent exceptions to this rule.

(4) So far as the Government, local authority and other organs and institutions exercising governmental power are concerned, they cannot maintain a suit for damages for defaming them.

(5) Rules 3 and 4 do not, however, mean that Official Secrets Act, 1923, or any similar enactment or provision having the force of law does not bind the press or media.

(6) There is no law empowering the State or its officials to prohibit, or to impose a prior restraint upon the press/media."

80. So is the Right to Informational Self Determination, as specifically spelled out by US Supreme Court in *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*[35]. Because of the aforesaid reasons and keeping in mind the principle of judicial discipline, we have made conscious choice not to deal with these aspects and it would be for the parties to raise these issues before the Constitution Bench. Accordingly, other arguments based on Articles 14 and 19 of the Constitution as well as competence of the legislature to enact such law are being examined.

81. We have deeply deliberated on the arguments advanced by various counsel appearing for different petitioners as well as counter submissions made by counsel appearing on behalf of the State. Undoubtedly, the issue that confronts us is of seminal importance. In recent times, issues about the proprietary, significance, merits and demerits have generated lots of debate among intelligentia. The Government claims that this provision is introduced in the Statute to achieve laudable objectives and it is in public interest. It is felt that this technology can solve many development

challenges. The petitioners argue that the move is impermissible as it violates their fundamental rights. It falls in the category of, what Ronald Dworkin calls, "hard cases". Nevertheless, the duty of the court is to decide such cases as well and give better decision. While undertaking this exercise of judicial review, let us first keep in mind the width and extent of power of judicial review of a legislative action. The Court cannot question the wisdom of the Legislature in enacting a particular law. It is required to act within the domain available to it.

Scope of Judicial Review of Legislative Act

82. Under the Constitution, Supreme Court as well as High Courts are vested with the power of judicial review of not only administrative acts of the executive but legislative enactments passed by the legislature as well. This power is given to the High Courts under Article 226 of the Constitution and to the Supreme Court under Article 32 as well as Article 136 of the Constitution. At the same time, the parameters on which the power of judicial review of administrative act is to be undertaken are different from the parameters on which validity of legislative enactment is to be examined. No doubt, in exercises of its power of judicial review of legislative action, the Supreme Court, or for that matter, the High Courts can declare law passed by the Parliament or the State Legislature as invalid. However, the power to strike down primary legislation enacted by the Union or the State Legislatures is on limited grounds. Courts can strike down legislation either on the basis that it falls foul of federal distribution of powers or that it contravenes fundamental rights or other Constitutional rights/provisions of the Constitution of India. No doubt, since the Supreme Court and the High Courts are treated as the 'ultimate arbiter in all matters involving interpretation of the Constitution, it is the Courts which have the final say on questions relating to rights and whether such a right is violated or not. The basis of the aforesaid statement lies in Article 13(2) of the Constitution which proscribes the State from making 'any law which takes away or abridges the right conferred by Part III', enshrining fundamental rights. It categorically states that any law made in contravention thereof, to the extent of the contravention, be void.

83. We can also take note of Article 372 of the Constitution at this stage which applies to pre-constitutional laws. Article 372(1) reads as under:

> "372. Continuance in force of existing laws and their adaptation.-
>
> (1) Notwithstanding the repeal by this Constitution of the enactments referred to in article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority."

84. In the context of judicial review of legislation, this provision gives an indication that all laws enforced prior to the commencement of the Constitution can be tested for compliance with the provisions of the Constitution by Courts. Such a power is recognised by this Court in *Union of India* v. *Sicom Limited*[36]. In that judgment, it was also held that since the term 'laws', as per Article 372, includes common law the power of judicial review of legislation, which is a part of common law applicable in India before the Constitution came into force, would continue to vest in the Indian courts.

85. With this, we advert to the discussion on the grounds of judicial review that are available to adjudge the validity of a piece of legislation passed by the Legislature. We have already mentioned that a particular law or a provision contained in a statute can be invalidated on two grounds, namely: (i) it is not within the competence of the Legislature which passed the law, and/or (ii) it is in contravention of any of the fundamental rights stipulated in Part III of the Constitution or any other right/provision of the Constitution. These contours of the judicial review are spelled

out in the clear terms in case of *Rakesh Kohli*[37], and particularly the following paragraphs:

"16. The statute enacted by Parliament or a State Legislature cannot be declared unconstitutional lightly. The court must be able to hold beyond any iota of doubt that the violation of the constitutional provisions was so glaring that the legislative provision under challenge cannot stand. Sans flagrant violation of the constitutional provisions, the law made by Parliament or a State Legislature is not declared bad.

17. This Court has repeatedly stated that legislative enactment can be struck down by court only on two grounds, namely (i) that the appropriate legislature does not have the competence to make the law, and (ii) that it does not (sic) take away or abridge any of the fundamental rights enumerated in Part III of the Constitution or any other constitutional provisions. In McDowell and Co. while dealing with the challenge to an enactment based on Article 14, this Court stated in para 43 of the Report as follows: (SCC pp. 737-38)

""43. ... A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone viz. (1) lack of legislative competence, and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground. ... if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by sub-clauses (a) to (g) of Article 19(1), it can be struck down only if it is found not saved by any of the clauses (2) to (6) of Article 19 and so on. No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or the other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The court cannot sit in judgment over their wisdom."

(emphasis supplied)

26. In Mohd. Hanif Quareshi, the Constitution Bench further observed that there was always a presumption in favour of constitutionality of an enactment and the burden is upon him, who attacks it, to show that there has been a clear violation of the constitutional principles. It stated in para 15 of the Report as under: (AIR pp. 740-41)

""15. ... The courts, it is accepted, must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. It must be borne in mind that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest and finally that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation."

27. The above legal position has been reiterated by a Constitution Bench of this Court in *Mahant Moti Das* v. *S.P. Sahi*.

28. In *Hamdard Dawakhana* v. *Union of India*, inter alia, while referring to the earlier two decisions, namely, Bengal Immunity Co. Ltd. and Mahant Moti Das, it was observed in para 8 of the Report as follows: (*Hamdard Dawakhana case*, AIR p. 559):

""8. Therefore, when the constitutionality of an enactment is challenged on the ground of violation of any of the articles in Part III of the Constitution, the ascertainment of its true nature and character becomes necessary i.e. its subject -matter, the area in which it is intended to operate, its purport and intent have to be determined. In order to do so it is legitimate to take into consideration all the factors such as history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it intended to suppress, the remedy for the disease which the legislature resolved to cure and the true reason for the remedy...."

In Hamdard Dawakhana, the Court also followed the statement of law in Mahant Moti Das and the two earlier decisions, namely, *Charanjit Lal Chowdhury* v. *Union of India* and *State of Bombay* v. *F.N. Balsara* and reiterated the principle that presumption was always in favour of constitutionality of an enactment.

xx xx xx

30. A well-known principle that in the field of taxation, the legislature enjoys a greater latitude for classification, has been noted by this Court in a long line of cases. Some of these decisions are *Steelworth Ltd.* v. *State of Assam*; *Gopal Narain* v. *State of U.P.*; *Ganga Sugar Corpn. Ltd.* v. *State of U.P.*; *R.K. Garg* v. *Union of India*; and *State of W.B.* v. *E.I.T.A. India Ltd.*"

86. Again in *Ashok Kumar Thakur* v. *Union of India*[38], this Court made the following pertinent observations:

"219. A legislation passed by Parliament can be challenged only on constitutionally recognised grounds. Ordinarily, grounds of attack of a legislation is whether the legislature has legislative competence or whether the legislation is ultra vires the provisions of the Constitution. If any of the provisions of the legislation violates fundamental rights or any other provisions of the Constitution, it could certainly be a valid ground to set aside the legislation by invoking the power of judicial review. A legislation could also be challenged as unreasonable if it violates the principles of equality adumbrated in our Constitution or it unreasonably restricts the fundamental rights under Article 19 of the Constitution. A legislation cannot be challenged simply on the ground of unreasonableness because that by itself does not constitute a ground. The validity of a constitutional amendment and the validity of plenary legislation have to be decided purely as questions of constitutional law. This Court in *State of Rajasthan* v. *Union of India* said: (SCC p. 660, para 149)

"149. ... if a question brought before the court is purely a political question not involving determination of any legal or constitutional right or obligation, the court would not entertain it, since the court is concerned only with adjudication of legal rights and liabilities."

Therefore, the plea of the petitioner that the legislation itself was intended to please a section of the community as part of the vote catching mechanism is not a legally acceptable plea and it is only to be rejected."

87. Furthermore, it also needs to be specifically noted that this Court emphasised that apart from the aforesaid two grounds no third ground is available to invalidate any piece of legislation. In this behalf it would be apposite to reproduce the following observations from *State of A.P.* v. *McDowell & Co.*[39], which is a judgment rendered by a three Judge Bench of this Court:

"43...A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground. We do not wish to enter into a discussion of the concepts of procedural

unreasonableness and substantive unreasonableness — concepts inspired by the decisions of United States Supreme Court. Even in U.S.A., these concepts and in particular the concept of substantive due process have proved to be of unending controversy, the latest thinking tending towards a severe curtailment of this ground (substantive due process). The main criticism against the ground of substantive due process being that it seeks to set up the courts as arbiters of the wisdom of the legislature in enacting the particular piece of legislation. It is enough for us to say that by whatever name it is characterised, the ground of invalidation must fall within the four corners of the two grounds mentioned above. In other words, say, if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (a) to (g) of Article 19(1), it can be struck down only if it is found not saved by any of the clauses (2) to (6) of Article 19 and so on. No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The court cannot sit in judgment over their wisdom. In this connection, it should be remembered that even in the case of administrative action, the scope of judicial review is limited to three grounds, viz., (i) unreasonableness, which can more appropriately be called irrationality, (ii) illegality and (iii) procedural impropriety (see *Council of Civil Service Unions* v. *Minister for Civil Service* [1985 AC 374 : (1984) 3 All ER 935 : (1984) 3 WLR 1174] which decision has been accepted by this Court as well). The applicability of doctrine of proportionality even in administrative law sphere is yet a debatable issue. (See the opinions of Lords Lowry and Ackner in *R.* v. *Secy. of State for Home Deptt.*, ex p Brind [1991 AC 696 : (1991) 1 All ER 720] AC at 766-67 and 762.) It would be rather odd if an enactment were to be struck down by applying the said principle when its applicability even in administrative law sphere is not fully and finally settled..."

88. Another aspect in this context, which needs to be emphasized, is that a legislation cannot be declared unconstitutional on the ground that it is 'arbitrary' inasmuch as examining as to whether a particular Act is arbitrary or not implies a value judgment and the courts do not examine the wisdom of legislative choices and, therefore, cannot undertake this exercise. This was so recognised in a recent judgment of this Court *Rajbala* v. *State of Haryana*[40] wherein this Court held as under:

"64. From the above extract from *McDowell & Co. case* it is clear that the courts in this country do not undertake the task of declaring a piece of legislation unconstitutional on the ground that the legislation is "arbitrary" since such an exercise implies a value judgment and courts do not examine the wisdom of legislative choices unless the legislation is otherwise violative of some specific provision of the Constitution. To undertake such an examination would amount to virtually importing the doctrine of "substantive due process" employed by the American Supreme Court at an earlier point of time while examining the constitutionality of Indian legislation. As pointed out in the above extract, even in United States the doctrine is currently of doubtful legitimacy. This Court long back in *A.S. Krishna* v. *State of Madras* declared that the doctrine of due process has no application under the Indian Constitution As pointed out by Frankfurter, J., arbitrariness became a mantra.

65. For the above reasons, we are of the opinion that it is not permissible for this

Court to declare a statute unconstitutional on the ground that it is 'arbitrary'."

89. Same sentiments were expressed earlier by this Court in *K.T. Plantation Private Limited*[41] in the following words:

> "205. Plea of unreasonableness, arbitrariness, proportionality, etc. always raises an element of subjectivity on which a court cannot strike down a statute or a statutory provision, especially when the right to property is no more a fundamental right. Otherwise the court will be substituting its wisdom to that of the legislature, which is impermissible in our constitutional democracy."

90. A fortiorari, a law cannot be invalidated on the ground that the Legislature did not apply its mind or it was prompted by some improper motive.

91. It is, thus, clear that in exercise of power of judicial review, Indian Courts are invested with powers to strike down primary legislation enacted by the Parliament or the State legislatures. However, while undertaking this exercise of judicial review, the same is to be done at three levels. In the first stage, the Court would examine as to whether impugned provision in a legislation is compatible with the fundamental rights or the Constitutional provisions (substantive judicial review) or it falls foul of the federal distribution of powers (procedural judicial review). If it is not found to be so, no further exercise is needed as challenge would fail. On the other hand, if it is found that Legislature lacks competence as the subject legislated was not within the powers assigned in the list in VII Schedule, no further enquiry is needed and such a law is to be declared as ultravires the Constitution. However, while undertaking substantive judicial review, if it is found that the impugned provision appears to be violative of fundamental rights or other Constitutional rights, the Court reaches the second stage of review. At this second phase of enquiry, the Court is supposed to undertake the exercise as to whether the impugned provision can still be saved by reading it down so as to bring it in conformity with the Constitutional provisions. If that is not achievable then the enquiry enters the third stage. If the offending portion of the statute is severable, it is severed and the Court strikes down the impugned provision declaring the same as unconstitutional.

92. Keeping in view the aforesaid parameters we, at this stage, we want to devote some time discussing the arguments of the petitioners based on the concept of 'limited government'.

Concent of 'Limited Government' and its impact on powers of Judicial Review

93. There cannot be any dispute about the manner in which Mr. Shyam Divan explained the concept of 'limited Government' in his submissions. Undoubtedly, the Constitution of India, as an instrument of governance of the State, delineates the functions and powers of each wing of the State, namely, the Legislature, the Judiciary and the Executive. It also enshrines the principle of separation of powers which mandates that each wing of the State has to function within its own domain and no wing of the State is entitled to trample over the function assigned to the other wing of the State. This fundamental document of governance also contains principle of federalism wherein the Union is assigned certain powers and likewise powers of the State are also prescribed. In this context, the Union Legislature, i.e. the Parliament, as well as the State Legislatures are given specific areas in respect of which they have power to legislate. That is so stipulated in Schedule VII of the Constitution wherein List I enumerates the subjects over which Parliament has the dominion, List II spells out those areas where the State Legislatures have the power to make laws while List III is the Concurrent List which is accessible both to the Union as well as the State Governments. The Scheme pertaining to making laws by the Parliament as well as by the Legislatures of the State is primarily contained in Articles 245 to 254 of the Constitution. Therefore, it cannot be disputed that each wing of the State to act within the sphere delineated for it under the Constitution. It is correct that crossing these

limits would render the action of the State *ultra vires* the Constitution. When it comes to power of taxation, undoubtedly, power to tax is treated as sovereign power of any State. However, there are constitutional limitations briefly described above. In a nine Judge Bench decision of this Court in *Jindal Stainless Ltd.* v. *State of Haryana*[42] discussion on these constitutional limitations are as follows:

> "20. Exercise of sovereign power is, however, subject to Constitutional limitations especially in a federal system like ours where the States also to the extent permissible exercise the power to make laws including laws that levy taxes, duties and fees. That the power to levy taxes is subject to constitutional limitations is no longer res-integra. A Constitution Bench of this Court has in *Synthetics and Chemicals Ltd.* v. *State of U.P.* (1990) 1 SCC 109 recognised that in India the Centre and the States both enjoy the exercise of sovereign power, to the extent the Constitution confers upon them that power. This Court declared:
>
> > "56 ... We would not like, however, to embark upon any theory of police power because the Indian Constitution does not recognise police power as such. But we must recognise the exercise of Sovereign power which gives the State sufficient authority to enact any law subject to the limitations of the Constitution to discharge its functions. Hence, the Indian Constitution as a sovereign State has power to legislate on all branches except to the limitation as to the division of powers between the Centre and the States and also subject to the fundamental rights guaranteed under the Constitution. The Indian States, between the Centre and the States, has sovereign power. The sovereign power is plenary and inherent in every sovereign State to do all things which promote the health, peace, morals, education and good order of the people. Sovereignty is difficult to define. This power of sovereignty is, however, subject to constitutional limitations." This power, according to some constitutional authorities, is to the public what necessity is to the individual. Right to tax or levy impost must be in accordance with the provisions of the Constitution."
>
> 21. What then are the Constitutional limitations on the power of the State legislatures to levy taxes or for that matter enact legislations in the field reserved for them under the relevant entries of List II and III of the Seventh Schedule. The first and the foremost of these limitations appears in Article 13 of the Constitution of India which declares that all laws in force in the territory of India immediately before the commencement of the Constitution are void to the extent they are inconsistent with the provisions of Part III dealing with the fundamental rights guaranteed to the citizens. It forbids the States from making any law which takes away or abridges, any provision of Part III. Any law made in contravention of the said rights shall to the extent of contravention be void. There is no gain saying that the power to enact laws has been conferred upon the Parliament subject to the above Constitutional limitation. So also in terms of Article 248, the residuary power to impose a tax not otherwise mentioned in the Concurrent List or the State List has been vested in the Parliament to the exclusion of the State legislatures, and the States' power to levy taxes limited to what is specifically reserved in their favour and no more.
>
> 22. Article 249 similarly empowers the Parliament to legislate with respect to a matter in the State List for national interest provided the Council of States has declared by a resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in national interest to do so. The power is available till such time any resolution remains in force in terms of Article 249(2) and the proviso thereunder.
>
> 23. Article 250 is yet another provision which empowers the Parliament to legislate with respect to any matter in the State List when there is a proclamation of

emergency. In the event of an inconsistency between laws made by Parliament under Articles 249 and 250, and laws made by legislature of the States, the law made by Parliament shall, to the extent of the inconsistency, prevail over the law made by the State in terms of Article 251.

24. The power of Parliament to legislate for two or more States by consent, in regard to matters not otherwise within the power of the Parliament is regulated by Article 252, while Article 253 starting with a non-obstante clause empowers Parliament to make any law for the whole country or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

94. Mr. Divan, however, made an earnest endeavour to further broaden this concept of 'limited Government' by giving an altogether different slant. He submitted that there are certain things that the States simply cannot do because the action fundamentally alters the relationship between the citizens and the State. In this hue, he submitted that it was impermissible for the State to undertake the exercise of collection of bio-metric data, including fingerprints and storing at a central depository as it puts the State in an extremely dominant position in relation to the individual citizens. He also submitted that it will put the State in a position to target an individual and engage in surveillance thereby depriving or withholding the enjoyment of his rights and entitlements, which is totally impermissible in a country where governance of the State of founded on the concept of 'limited Government'. Again, this concept of limited government is woven around Article 21 of the Constitution.

95. Undoubtedly, we are in the era of liberalised democracy. In a democratic society governed by the Constitution, there is a strong trend towards the Constitutionalisation of democratic politics, where the actions of democratic elected Government are judged in the light of the Constitution. In this context, judiciary assumes the role of protector of the Constitution and democracy, being the ultimate arbiter in all matters involving the interpretation of the Constitution.

96. Having said so, when it comes to exercising the power of judicial review of a legislation, the scope of such a power has to be kept in mind and the power is to be exercised within the limited sphere assigned to the judiciary to undertake the judicial review. This has already been mentioned above. Therefore, unless the petitioner demonstrates that the Parliament, in enacting the impugned provision, has exceeded its power prescribed in the Constitution or this provision violates any of the provision, the argument predicated on 'limited governance' will not succeed. One of the aforesaid ingredients needs to be established by the petitioners in order to succeed.

97. Even in the case of *Thakur Bharath Singh*[43] relied upon by Mr. Divan, wherein executive order was passed imposing certain restrictions requiring the respondent therein to reside at a particular place as specified in the order, which was passed in exercise of powers contained under Section 3(1)(b) of the M.P. Public Security Act, 1959, the Court struck down and quashed the order only after it found that restrictions contained therein were unreasonable and violative of fundamental freedom guaranteed under Article 19(1)(d) and (e) of the Constitution of India.

98. With this, we proceed to consider the arguments on which vires of the impugned provisions are questioned:

Argument of Legislative Competence

99. It is not denied by the petitioners that having regard to the provisions of Article 246 of the Constitution and Entries 82 and 97 of List I, the Parliament has requisite competence to enact the impugned legislation. However, the submission of the petitioners was that the impugned legislative provision was made as per which enrolment under Aadhaar had become mandatory for the income tax assessees,

whereas this Court has passed various orders repeatedly emphasising that enrolment for Aadhaar card has to be voluntary. On this basis, the argument is that the Legislature lacked the authority to pass a law contrary to the judgments of this Court, without removing the basis of those judgments. It was also argued that even Aadhaar Act was voluntary in nature and the basis of the judgments of this Court could be taken away only by making enrolment under the Aadhaar Act compulsory, which was not done.

100. Before proceeding to discuss this argument, one aspect of the matter needs clarification. There was a debate as to whether Aadhaar Act is voluntary or even that Act makes enrolment under Aadhaar mandatory.

101. First thing that is to be kept in mind is that the Aadhaar Act is enacted to enable the Government to identify individuals for delivery of benefits, subsidies and services under various welfare schemes. This is so mentioned in Section 7 of the Aadhaar Act which states that proof of Aadhaar number is necessary for receipt of such subsidies, benefits and services. At the same time, it cannot be disputed that once a person enrols himself and obtains Aadhaar number as mentioned in Section 3 of the Aadhaar Act, such Aadhaar number can be used for many other purposes. In fact, this Aadhaar number becomes the Unique Identity (UID) of that person. Having said that, it is clear that there is no provision in Aadhaar Act which makes enrolment compulsory. May be for the purpose of obtaining benefits, proof of Aadhaar card is necessary as per Section 7 of the Act. Proviso to Section 7 stipulates that if an Aadhaar number is not assigned to enable an individual, he shall be offered alternate and viable means of identification for delivery of the subsidy, benefit or service. According to the petitioners, this proviso, with acknowledges alternate and viable means of identification, and therefore makes Aadhaar optional and voluntary and the enrolment is not necessary even for the purpose of receiving subsidies, benefits and services under various schemes of the Government. The respondents, however, interpret the proviso differently and there plea is that the words 'if an Aadhaar number is not assigned to an individual' deal with only that situation where application for Aadhaar has been made but for certain reasons Aadhaar number has not been assigned as it may take some time to give Aadhaar card. Therefore, this proviso is only by way of an interim measure till Aadhaar number is assigned, which is otherwise compulsory for obtaining certain benefits as stated in Section 7 of the Aadhaar Act. Fact remains that as per the Government and UIDAI itself, the requirement of obtaining Aadhaar number is voluntary. It has been so claimed by UIDAI on its website and clarification to this effect has also been issued by UIDAI.

102. Thus, enrolment under Aadhaar is voluntary. However, it is a moot question as to whether for obtaining benefits as prescribed under Section 7 of the Aadhaar Act, it is mandatory to give Aadhaar number or not is a debatable issue which we are not addressing as this very issue is squarely raised which is the subject matter of other writ petition filed and pending in this Court.

103. On the one hand, enrollment under Aadhaar card is voluntary, however, for the purposes of Income Tax Act, Section 139AA makes it compulsory for the assessees to give Aadhaar number which means insofar as income tax assessees are concerned, they have to necessarily enroll themselves under the Aadhaar Act and obtain Aadhaar number which will be their identification number as that has become the requirement under the Income Tax Act. The contention that since enrollment under Aadhaar Act is voluntary, it cannot be compulsory under the Income Tax Act, cannot be countenanced. As already mentioned above, purpose for enrollment under the Aadhaar Act is to avail benefits of various welfare schemes etc. as stipulated in Section 7 of the Aadhaar Act. Purpose behind Income Tax Act, on the other hand, is entirely different which has already been discussed in detail above. For achieving the said purpose, viz., to curb blackimonay, money launderina and tax evasion etc., if the Parliament chooses

to make the provision mandatory under the Income Tax Act, the competence of the Parliament cannot be questioned on the ground that it is impermissible only because under Aadhaar Act, the provision is directory in nature. It is the prerogative of the Parliament to make a particular provision directory in one statute and mandatory/compulsory in other. That by itself cannot be a ground to question the competence of the legislature. After all, Aadhaar Act is not a mother Act. Two laws, i.e., Aadhaar Act, on the one hand, and law in the form of Section 139AA of the Income Tax Act, on the other hand, are two different stand alone provisions/laws and validity of one cannot be examined in the light of provisions of other Acts. In *Municipal Corporation of Delhi* v. *Shiv Shanker*[44], if the objects of two statutory provisions are different and language of each statute is restricted to its own objects or subject, then they are generally intended to run in parallel lines without meeting and there would be no real conflict though apparently it may appear to be so on the surface. We reproduce hereunder the discussion to the aforesaid aspect contained in the said judgment:

> "5. ... It is only when a consistent body of law cannot be maintained without abrogation of the previous law that the plea of implied repeal should be sustained. To determine if a later statutory provision repeals by implication an earlier one it is accordingly necessary to closely scrutinise and consider the true meaning and effect both of the earlier and the later statute. Until this is done it cannot be satisfactorily ascertained if any fatal inconsistency exists between them. The meaning, scope and effect of the two statutes, as discovered on scrutiny, determines the legislative intent as to whether the earlier law shall cease or shall only be supplemented. If the objects of the two statutory provisions are different and the language of each statute is restricted to its own objects or subject, then they are generally intended to run in parallel lines without meeting and there would be no real conflict though apparently it may appear to be so on the surface. Statutes in pari materia although in apparent conflict, should also, so far as reasonably possible, be construed to be in harmony with each other and it is only when there is an irreconcilable conflict between the new provision and the prior statute relating to the same subject-matter, that the former, being the later expression of the legislature, may be held to prevail, the prior law yielding to the extent of the conflict. The same rule of irreconcilable repugnancy controls implied repeal of a general by a special statute. The subsequent provision treating a phase of the same general subject-matter in a more minute way may be intended to imply repeal protanto of the repugnant general provision with which it cannot reasonably co-exist. When there is no inconsistency between the general and the special statute the later may well be construed as supplementary."

104. In view of the above, we are not impressed by the contention of the petitioners that the two enactments are contradictory with each other. A harmonious reading of the two enactments would clearly suggests that whereas enrollment of Aadhaaar is voluntary when it comes to taking benefits of various welfare schemes even if it is presumed that requirement of Section 7 of Aadhaar Act that it is necessary to provide Aadhaar number to avail the benefits of schemes and services, it is upto a person to avail those benefits or not. On the other hand, purpose behind enacting Section 139AA is to check a menace of black money as well as money laundering and also to widen the income tax net so as to cover those persons who are evading the payment of tax.

105. Main emphasis, however, is on the plea that Parliament or any State legislature cannot pass a law that overrules a judgment thereby nullifying the said decision, that too without removing the basis of the decision. This argument appears to be attractive inasmuch as few orders are passed by this Court in pending writ petitions which are to the effect that the enrollment of Aadhaar would be voluntary.

However, it needs to be kept in mind that the orders have been passed in the petitions where Aadhaar scheme floated as an executive/administrative measure has been challenged. In those cases, the said orders are not passed in a case where the Court was dealing with a statute passed by the Parliament. Further, these are interim orders as the Court was of the opinion that till the matter is decided finally in the context of Right to Privacy issue, the implementation of the said Aadhaar scheme would remain voluntary. In fact, the main issue as to whether Aadhaar card scheme whereby biometric data of an individual is collected violates Right to Privacy and, therefore, is offensive of Article 21 of the Constitution or not is yet to be decided. In the process, the Constitution Bench is also called upon to decide as to whether Right to Privacy is a part of Article 21 of the Constitution at all. Therefore, no final decision has been taken. In a situation like this, it cannot be said that Parliament is precluded from or it is rendered incompetent to pass such a law. That apart, the argument of the petitioners is that the basis on which the aforesaid orders are passed has to be removed, which is not done. According to the petitioners, it could be done only by making Aadhaar Act compulsory. It is difficult to accept this contention for two reasons: first, when the orders passed by this Court which are relied upon by the petitioners were passed when Aadhaar Act was not even enacted. Secondly, as already discussed in detail above, Aadhaar Act and the law contained in Section 139AA of the Income Tax Act deal with two different situations and operate in different fields. This argument of legislature incompetence also, therefore, has fails.

Whether Section 139AA of the Act is discriminatory and offends Article 14 of the Constitution of India?

106. Article 14, which enshrines the principle of equality as a fundamental right mandates that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. It, thus, gives the right to equal treatment in similar circumstances, both in privileges conferred and in the liabilities imposed. In *Sri. Srinavasa Theatre* v. *Government of Tamil Nadu*[45], this Court explained that the two expressions 'equality before law' and 'equal protection of law' do not mean the same thing even if there may be much in common between them. "Equality before law" is a dynamic concept having many facets. One facet is that there shall be no privileged person or class and that one shall be above law. Another facet is "the obligation upon the State to bring about, through the machinery of law, a more equal society... For, equality before law can be predicated meaningfully only in an equal society...". The Court further observed that Article 14 prescribes equality before law. But the fact remains that all persons are not equal by nature, attainment or circumstances, and, therefore, a mechanical equality before the law may result in injustice. Thus, the guarantee against the denial of equal protection of the law does not mean that identically the same rules of law should be made applicable to all persons in spite of difference in circumstances or conditions (See *Chiranjit Lal Chowdhuri* v. *Union of India*[46]).

107. The varying needs of different classes or sections of people require differential and separate treatment. The Legislature is required to deal with diverse problems arising out of an infinite variety of human relations. It must, therefore, necessarily have the power of making laws to attain particular objects and, for that purpose, of distinguishing, selecting and classifying persons and things upon which its laws are to operate. The principle of equality of law, thus, means not that the same law should apply to everyone but that a law should deal alike with all in one class; that there should be an equality of treatment under equal circumstances. It means "that equals should not be treated unlike and unlikes should not be treated alike. Likes should be treated alike.

108. What follows is that Article 14 forbids class legislation; it does not forbid

reasonable classification of persons, objects and transactions by the Legislature for the purpose of achieving specific ends. Classification to be reasonable should fulfil the following two tests:

(1) It should not be arbitrary, artificial or evasive. It should be based on an intelligible differentia, some real and substantial distinction, which distinguishes persons or things grouped together in the class from others left out of it.

(2) The differentia adopted as the basis of classification must have a rational or reasonable nexus with the object sought to be achieved by the statute in question.

109. Thus, Article 14 in its ambit and sweep involves two facets, viz., it permits reasonable classification which is founded on intelligible differentia and accommodates the practical needs of the society and the differential must have a rational relation to the objects sought to be achieved. Further, it does not allow any kind of arbitrariness and ensures fairness and equality of treatment. It is the *fonjuris* of our Constitution, the fountainhead of justice. Differential treatment does not *per se* amount to violation of Article 14 of the Constitution and it violates Article 14 only when there is no reasonable basis and there are several tests to decide whether a classification is reasonable or not and one of the tests will be as to whether it is conducive to the functioning of modern society.

110. Insofar as the impugned provision is concerned, Mr. Datar had conceded that first test that of reasonable classification had been satisfied as he conceded that individual assesses form a separate class and the impugned provision which targeted only individual assesses would not be discriminatory on this ground. His whole emphasis was that Section 139AA did not satisfy the second limb of the twin tests of classification as, according to him, this provision had no rational nexus with the object sought to be achieved.

111. In this behalf, his submission was that if the purpose of the provision was to curb circulation of black money, such an object was not achievable by seeing PAN with Aadhaar inasmuch as Aadhaar is only for individuals. His submission was that it is only the individuals who are responsible for generating black money or money laundering. This was the basis for Mr. Datar's submission. We find it somewhat difficult to accept such a submission.

112. Unearthing black money or checking money laundering is to be achieved to whatever extent possible. Various measures can be taken in this behalf. If one of the measures is introduction of Aadhaar into the tax regime, it cannot be denounced only because of the reason that the purpose would not be achieved fully. Such kind of menace, which is deep rooted, needs to be tackled by taking multiple actions and those actions may be initiated at the same time. It is the combined effect of these actions which may yield results and each individual action considered in isolation may not be sufficient. Therefore, rationality of a particular measure cannot be challenged on the ground that it has no nexus with the objective to be achieved. Of course, there is a definite objective. For this purpose alone, individual measure cannot be ridiculed. We have already taken note of the recommendations of SIT on black money headed by Justice M.B. Shah. We have also reproduced the measures suggested by the committee headed by Chairman, CBDT on 'Measures to tackle black money in India and Abroad'. They have, in no uncertain terms, suggested that one singular proof of identity of a person for entering into finance/business transactions etc. may go a long way in curbing this foul practice. That apart, even if solitary purpose of de-duplication of PAN cards is taken into consideration, that may be sufficient to meet the second test of Article 14. It has come on record that 11.35 lakhs cases of duplicate PAN or fraudulent PAN cards have already been detected and out of this 10.52 lakh cases pertain to individual assessees. Seeding of Aadhaar with PAN has certain benefits

which have already been enumerated. Furthermore, even when we address the issue of shell companies, fact remains that companies are after all floated by individuals and these individuals have to produce documents to show their identity. It was sought to be argued that persons found with duplicate/bogus PAN cards are hardly 0.4% and, therefore, there was no need to have such a provision. We cannot go by percentage figures. The absolute number of such cases is 10.52 lakh, which figure, by no means, can be termed as miniscule, to harm the economy and create adverse effect on the nation. Respondents have argued that Aadhaar will ensure that there is no duplication of identity as bio-metric will not allow that and, therefore, it may check the growth of shell companies as well.

113. Having regard to the aforesaid factors, it cannot be said that there is no nexus with the objective sought to be achieved.

114. Another argument predicated on Article 14 advanced by Mr. Divan was that it was discriminatory in nature as it created two classes; one class of those who volunteered to enrol themselves under Aadhaar scheme and other class of those who did not want it to be so. It was further submitted that in this manner this provision had the effect of creating an artificial class of those who object to Aadhaar scheme as self conscious persons. This is a fallacious argument.

115. Validity of a legislative act cannot be challenged by creating artificial classes by those who are objecting to the said provision and predicating the argument of discrimination on that basis. When a law is made, all those who are covered by that law are supposed to follow the same. No doubt, it is the right of a citizen to approach the Court and question the constitutional validity of a particular law enacted by the Legislature. However, merely because a section of persons opposes the law, would not mean that it has become a separate class by itself. Two classes, cannot be created on this basis, namely, one of those who want to be covered by the scheme, and others who do not want to be covered thereby. If such a proposition is accepted, every legislation would be prone to challenge on the ground of discrimination. As far as plea of discrimination is concerned, it has to be raised by showing that the impugned law creates two classes without any reasonable classification and treats them differently.

116. The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances, in the same position, as the varying needs of different classes of persons often require separate treatment. It is permissible for the State to classify persons for legitimate purposes. The Legislature is also competent to exercise its discretion and make classification. In the present scenario the impugned legislation has created two classes, i.e. one class of those persons who are assessees and other class of those persons who are income tax assessees. It is because of the reason that the impugned provision is applicable only to those who are filing income tax returns. Therefore, the only question would be as to whether this classification is reasonable or not. There cannot be any dispute that there is a reasonable basis for differentiation and, therefore, equal protection clause enshrined in Article 14 is not attracted. What Article 14 prohibits is class legislation and not reasonable classification for the purpose of legislation. All income tax asessees constitute one class and they are treated alike by the impugned provision.

117. It may also be pointed out that the counsel for the respondents had argued that doctrine of proportionality cannot be read into Article 14 of the Constitution and in support reliance has been placed on the judgment of this Court in *E.P. Royappa* v. *State of Tamil Nadu*[47]. This aspect need not be considered in detail inasmuch as Mr. Datar, learned counsel appearing for the petitioner, had conceded at the Bar that he had invoked the doctrine of proportionality only in the context of Article 19(1)(g).

118. We, therefore, reject the argument founded on Article 14 of the Constitution.

Whether impugned provision is violative of Article 19(1)(g)

119. Invocation of provisions of Article 19(1)(g) of the Constitution by the petitioners was in the context of proviso to sub-section (2) of Section 139AA of the Act which contains the consequences of the failure to intimate the Aadhaar number to such authority in such form and manner as may be prescribed and reads as under:

"(2) Every person who has been allotted permanent account number as on the 1st day of July, 2017, and who is eligible to obtain Aadhaar number, shall intimate his Aadhaar number to such authority in such form and manner as may be prescribed, on or before a date to be notified by the Central Government in the Official Gazette:

Provided that in case of failure to intimate the Aadhaar number, the permanent account number allotted to the person shall be deemed to be invalid and the other provisions of this Act shall apply, as if the person had not applied for allotment of permanent account number."

120. The submission was that the aforesaid penal consequence was draconian in nature and totally disproportionate to the non-compliance of provisions contained in Section 139AA. It was pointed out that persons effected by Section 139AA are only individuals, i.e. natural persons and not legal/artificial personalities like companies, trusts, partnership firms, etc. Thus, individuals who are professionals like lawyers, doctors, architects and lakhs of businessmen having small or micro enterprises are going to suffer such a serious consequence for failure to intimate Aadhaar number to the designated authority. According to him, consequence of not having a PAN card results in a virtual 'civil death' as one example given was that under Rule 114B of the Rules, it will not be possible to operate bank accounts with transaction above Rs. 50,000/- or to use credit/debit cards or purchase motor vehicles or property etc.

121. Section 139A deals with PAN. Sub-section (1) thereof requires four classes of persons to have the PAN allotted. It reads as under:

"**139A. Permanent account number. -** (1) Every person, -

(i) if his total income or the total income of any other person in respect of which he is assessable under this Act during any previous year exceeded the maximum amount which is not chargeable to income-tax; or

(ii) carrying on any business or profession whose total sales, turnover or gross receipts are or is likely to exceed five lakh rupees in any previous year; or

(iii) who is required to furnish a return of income under sub-section (4A) of section 139; or

(iv) being an employer, who is required to furnish a return of fringe benefits under section 115WD.

and who has not been allotted a permanent account number shall, within such time, as may be prescribed, apply to the Assessing Officer for the allotment of a permanent account number."

122. This PAN number has to be mentioned/quoted in number of eventualities specified under sub-section (5), (5A), (5B), (5C), 5(D) and sub-section (6) of Section 139A. These provisions read as under:

"5. Every person shall -

(a) quote such number in all his returns to, or correspondence with, any income-tax authority;

(b) quote such number in all challans for the payment of any sum due under this Act;

(c) quote such number in all documents pertaining to such transactions as may be prescribed by the Board in the interests of the revenue, and entered into by him:

Provided that the Board may prescribe different dates for different transactions or class of transactions or for different class of persons:

Provided further that a person shall quote General Index Register Number till such time Permanent Account Number is allotted to such person;

(d) intimate the Assessing Officer any change in his address or in the name and nature of his business on the basis of which the permanent account number was allotted to him.

(5A) Every person receiving any sum or income or amount from which tax has been deducted under the provisions of Chapter XVIIB, shall intimate his permanent account number to the person responsible for deducting such tax under that Chapter:

Provided further that a person referred to in this sub-section, shall intimate the General Index Register Number till such time permanent account number is allotted to such person.

(5B) Where any sum or income or amount has been paid after deducting tax under Chapter XVIIB, every person deducting tax under that Chapter shall quote the permanent account number of the person to whom such sum or income or amount has been paid by him-

(i) in the statement furnished in accordance with the provisions of sub-section (2C) of section 192;

(ii) in all certificates furnished in accordance with the provisions of section 203;

(iii) in all returns prepared and delivered or caused to be delivered in accordance with the provisions of section 206 to any income-tax authority;

(iv) in all statements prepared and delivered or caused to be delivered in accordance with the provisions of sub-section (3) of section 200:

Provided that the Central Government may, by notification in the Official Gazette, specify different dates from which the provisions of this sub-section shall apply in respect of any class or classes of persons:

Provided further that nothing contained in sub-sections (5A) and (5B) shall apply in case of a person whose total income is not chargeable to income-tax or who is not required to obtain permanent account number under any provision of this Act if such person furnishes to the person responsible for deducting tax a declaration referred to in section 197A in the form and manner prescribed thereunder to the effect that the tax on his estimated total income of the previous year in which such income is to be included in computing his total income will be nil.

(5C) Every buyer or licensee or lessee referred to in section 206C shall intimate his permanent account number to the person responsible for collecting tax referred to in that section.

(5D) Every person collecting tax in accordance with the provisions of section 206C shall quote the permanent account number of every buyer or licensee or lessee referred to in that section -

(i) in all certificates furnished in accordance with the provisions of sub-section (5) of section 206C;

(ii) in all returns prepared and delivered or caused to be delivered in accordance with the provisions of sub-section (5A) or sub-section (5B) of section 206C to an income-tax authority;

(iii) in all statements prepared and delivered or caused to be delivered in accordance with the provisions of sub-section (3) of section 206C.

(6) Every person receiving any document relating to a transaction prescribed

under clause (c) of sub-section (5) shall ensure that the Permanent Account Number or the General Index Register Number has been duly quoted in the document."

123. Sub-section (8) empowers the Board to make Rules, *inter alia*, prescribing the categories of transactions in relation to which PAN is to be quoted. Rule 114B of the Rules lists the nature of transaction in sub-rule (a) to (r) thereof where PAN number is to be given.

124. According to the petitioners, it amounts to violating their fundamental right to carry on business/profession etc. as enshrined under Article 19(1)(g) of the Constitution which stands infringed and, therefore, it was for the State to show that the restriction is reasonable and in the interest of pubic under Article 19(6) of the Constitution. It is in this context, principle of proportionality has been invoked by the petitioners with their submission that restriction is unreasonable as it is utterly disproportionate for committing breach of Section 139AA of the Act.

125. As noted above, Mr. Datar had relied upon the judgment of this Court in *Modern Dental College & Research Centre*[48] and submitted that while applying the test of proportionality, the respondents were specifically required to demonstrate the that measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation (narrow tailoring) and also that there was proper relation between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right, (balancing two competing interests).

126. In order to consider the aforesaid submissions we may bifurcate Section 139AA in two parts, as follows:

(i) That portion of the provision which requires quoting of Aadhaar number (sub-section(1)) and requirement of intimating Aadhaar number to the prescribed authorities by these who are PAN holders (sub-section (2)).

(ii) Consequences of failure to intimate Aadhaar number to the prescribed authority by specified date.

127. Insofar as first limb of Section 139AA of the Act is concerned, we have already held that it was within the competence of the Parliament to make a provision of this nature and further that it is not offensive of Article 14 of the Constitution. This requirement, *per se*, does not find foul with Article 19(1)(g) of the Constitution either, inasmuch as, quoting the Aadhaar number for purposes mentioned in sub-section (1) or intimating the Aadhaar number to the prescribed authority as per the requirement of sub-section (2) does not, by itself, impinge upon the right to carry on profession or trade, etc. Therefore, it is not violative of Article 19(1)(g) of the Constitution either. In fact, that is not even the argument of the petitioners. Entire emphasis of the petitioners submissions, while addressing the arguments predicated on Article 19(1)(g) of the Constitution, is on the consequences that ensue in terms of proviso to sub-section (2) inasmuch as it is argued, as recorded above, that the consequences provided will have the effect of paralysing the right to carry on business/profession. Therefore, thrust is on the second part of Section 139AA of the Act, which we proceed to deal with, now.

128. At the outset, it may be mentioned that though PAN is issued under the provisions of the Act (Section 139A), its function is not limited to giving this number in the income-tax returns or for other acts to be performed under the Act, as mentioned in sub-sections (5), (5A), (5B), 5(C), 5(D) and 6 of Section 139A. Rule 114B of the Rules mandates quoting of this PAN in various other documents pertaining to different kinds of transactions listed therein. It is for sale and purchase of immovable property valued at Rs. 5 lakhs or more; sale or purchase of motor vehicle etc., while opening deposit account with a sum exceeding Rs. 50,000/- with a banking

company; while making deposit of more than Rs. 50,000/- in any account with Post Office, savings bank; a contract of a value exceeding Rs. 1 lakh for sale or purchase of securities as defined under the Securities Contract (Regulation) Act, 1956; while opening an account with a banking company; making an application for installation of a telephone connection; making payment to hotels and restaurants when such payment exceeds Rs. 25,000/- at any one time; while purchasing bank drafts or pay orders for an amount aggregating Rs. 50,000/- or more during any one day, when payment in cash; payment in cash in connection with travel to any foreign country of an amount exceeding Rs. 25,000/- at any one time; while making payment of an amount of Rs. 50,000/- or more to a mutual fund for purchase of its units or for acquiring shares or debentures/bonds in a company or bonds issued by the Reserve Bank of India; or when the transaction of purchase of bullion or jewellery is made by making payment in cash to a dealer above a specified amount, etc. This shows that for doing many activities of day to day nature, including in the course of business, PAN is to be given. Pithily put, in the absence of PAN, it will not be possible to undertake any of the aforesaid activities though this requirement is aimed at curbing the tax evasion. Thus, if the PAN of a person is withdrawn or is nullified, it definitely amounts to placing restrictions on the right to do business as a business under Article 19(1)(g) of the Act. The question would be as to whether these restrictions are reasonable and, therefore, meet the requirement of clause (6) of Article 19. In this context, when 'balancing' is to be done, doctrine of proportionality can be applied, which was explained in the case of *Modern Dental College & Research Centre*[49], in the following manner:

"Doctrine of proportionality explained and applied

59. Undoubtedly, the right to establish and manage the educational institutions is a fundamental right recognised under Article 19(1)(g) of the Act. It also cannot be denied that this right is not "absolute" and is subject to limitations i.e. "reasonable restrictions" that can be imposed by law on the exercise of the rights that are conferred under clause (1) of Article 19. Those restrictions, however, have to be reasonable. Further, such restrictions should be "in the interest of general public", which conditions are stipulated in clause (6) of Article 19, as under:

> "19.(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law insofar as it relates to, or prevent the State from making any law relating to—
>
> (i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
>
> (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise."

60. Another significant feature which can be noticed from the reading of the aforesaid clause is that the State is empowered to make any law relating to the professional or technical qualifications necessary for practising any profession or carrying on any occupation or trade or business. Thus, while examining as to whether the impugned provisions of the statute and rules amount to reasonable restrictions and are brought out in the interest of the general public, the exercise that is required to be undertaken is the balancing of fundamental right to carry on occupation on the one hand and the restrictions imposed on the other hand. This is what is known as "*doctrine of proportionality*". Jurisprudentially, "*proportionality*" can be defined as the set of rules determining the necessary and sufficient

conditions for limitation of a constitutionally protected right by a law to be constitutionally permissible. According to Aharon Barak (former Chief Justice, Supreme Court of Israel), there are four sub-components of proportionality which need to be satisfied [Aharon Barak, *Proportionality: Constitutional Rights and Their Limitation*(Cambridge University Press 2012).], a limitation of a constitutional right will be constitutionally permissible if:

(*i*) it is designated for a proper purpose;

(*ii*) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose;

(*iii*) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally

(*iv*) there needs to be a proper relation ("*proportionality stricto sensu*" or "*balancing*") between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right.

61. Modern theory of constitutional rights draws a fundamental distinction between the scope of the constitutional rights, and the extent of its protection. Insofar as the scope of constitutional rights is concerned, it marks the outer boundaries of the said rights and defines its contents. The extent of its protection prescribes the limitations on the exercises of the rights within its scope. In that sense, it defines the justification for limitations that can be imposed on such a right.

62. It is now almost accepted that there are no absolute constitutional rights and all such rights are related. As per the analysis of Aharon Barak, two key elements in developing the modern constitutional theory of recognising positive constitutional rights along with its limitations are the notions of democracy and the rule of law. Thus, the requirement of proportional limitations of constitutional rights by a sub-constitutional law i.e. the statute, is derived from an interpretation of the notion of democracy itself. Insofar as the Indian Constitution is concerned, democracy is treated as the basic feature of the Constitution and is specifically accorded a constitutional status that is recognised in the Preamble of the Constitution itself. It is also unerringly accepted that this notion of democracy includes human rights which is the cornerstone of Indian democracy. Once we accept the aforesaid theory (and there cannot be any denial thereof), as a fortiori, it has also to be accepted that democracy is based on a balance between constitutional rights and the public interests. In fact, such a provision in Article 19 itself on the one hand guarantees some certain freedoms in clause (1) of Article 19 and at the same time empowers the State to impose reasonable restrictions on those freedoms in public interest. This notion accepts the modern constitutional theory that the constitutional rights are related. This relativity means that a constitutional licence to limit those rights is granted where such a limitation will be justified to protect public interest or the rights of others. This phenomenon—of both the right and its limitation in the Constitution—exemplifies the inherent tension between democracy's two fundamental elements. On the one hand is the right's element, which constitutes a fundamental component of substantive democracy; on the other hand is the people element, limiting those very rights through their representatives. These two constitute a fundamental component of the notion of democracy, though this time in its formal aspect. How can this tension be resolved? The answer is that this tension is not resolved by eliminating the "losing" facet from the Constitution. Rather, the tension is resolved by way of a proper balancing of the competing principles. This is one of the expressions of the multi-faceted nature of democracy. Indeed, the inherent tension between democracy's different facets is a "constructive

tension". It enables each facet to develop while harmoniously coexisting with the others. The best way to achieve this peaceful coexistence is through balancing between the competing interests. Such balancing enables each facet to develop alongside the other facets, not in their place. This tension between the two fundamental aspects—rights on the one hand and its limitation on the other hand—is to be resolved by balancing the two so that they harmoniously coexist with each other. This balancing is to be done keeping in mind the relative social values of each competitive aspects when considered in proper context.

63. In this direction, the next question that arises is as to what criteria is to be adopted for a proper balance between the two facets viz. the rights and limitations imposed upon it by a statute. Here comes the concept of "proportionality", which is a proper criterion. To put it pithily, when a law limits a constitutional right, such a limitation is constitutional if it is proportional. The law imposing restrictions will be treated as proportional if it is meant to achieve a proper purpose, and if the measures taken to achieve such a purpose are rationally connected to the purpose, and such measures are necessary. This essence of doctrine of proportionality is beautifully captured by Dickson, C.J. of Canada in *R.* v. *Oakes*, in the following words (at p. 138):

> "To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures, responsible for a limit on a Charter right or freedom are designed to serve, must be "of" sufficient importance to warrant overriding a constitutional protected right or freedom ... Second ... the party invoking Section 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test..." Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be ... rationally connected to the objective. Second, the means ... should impair "as little as possible" the right or freedom in question ... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance". The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society."

64. The exercise which, therefore, is to be taken is to find out as to whether the limitation of constitutional rights is for a purpose that is reasonable and necessary in a democratic society and such an exercise involves the weighing up of competitive values, and ultimately an assessment based on proportionality i.e. balancing of different interests.

65. We may unhesitatingly remark that this doctrine of proportionality, explained hereinabove in brief, is enshrined in Article 19 itself when we read clause (1) along with clause (6) thereof. While defining as to what constitutes a reasonable restriction, this Court in a plethora of judgments has held that the expression "reasonable restriction" seeks to strike a balance between the freedom guaranteed by any of the sub-clauses of clause (1) of Article 19 and the social control permitted by any of the clauses (2) to (6). It is held that the expression "reasonable" connotes that the limitation imposed on a person in the enjoyment of the right should not be arbitrary or of an excessive nature beyond what is required in the interests of public. Further, in order to be reasonable, the restriction must have a reasonable relation to the object which the legislation seeks to achieve, and must not go in excess of that object (see *P.P. Enterprises* v. *Union of India* [P.P.

Enterprises v. *Union of India*, (1982) 2 SCC 33). At the same time, reasonableness of a restriction has to be determined in an objective manner and from the standpoint of the interests of the general public and not from the point of view of the persons upon whom the restrictions are imposed or upon abstract considerations (see *Mohd. Hanif Quareshi* v. *State of Bihar* AIR 1958 SC 731). In *M.R.F. Ltd.* v. *State of Kerala*, (1998) 8 SCC 227, this Court held that in examining the reasonableness of a statutory provision one has to keep in mind the following factors:

(1) The directive principles of State policy.

(2) Restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirement of the interest of the general public.

(3) In order to judge the reasonableness of the restrictions, no abstract or general pattern or a fixed principle can be laid down so as to be of universal application and the same will vary from case to case as also with regard to changing conditions, values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances.

(4) A just balance has to be struck between the restrictions imposed and the social control envisaged by Article 19(6).

(5) Prevailing social values as also social needs which are intended to be satisfied by the restrictions.

(6) There must be a direct and proximate nexus or reasonable connection between the restrictions imposed and the object sought to be achieved. If there is a direct nexus between the restrictions, and the object of the Act, then a strong presumption in favour of the constitutionality of the Act will naturally arise."

129. Keeping in view the aforesaid parameters and principles in mind, we proceed to discuss as to whether the 'restrictions' which would result in terms of proviso to sub -section (2) of Section 139AA of the Act are reasonable or not.

130. Let us revisit the objectives of Aadhaar, and in the process, that of Section 139AA in particular.

131. By making use of the technology, a method is sought to be devised, in the form of Aadhaar, whereby identity of a person is ascertained in a flawless manner without giving any leeway to any individual to resort to dubious practices of showing multiple identities or fictitious identities. That is why it is given the nomenclature 'unique identity'. It is aimed at securing advantages on different levels some of which are described, in brief, below:

(i) In the first instance, as a welfare and democratic State, it becomes the duty of any responsible Government to come out with welfare schemes for the upliftment of poverty stricken and marginalised sections of the society. This is even the ethos of Indian Constitution which casts a duty on the State, in the form of 'Directive Principles of State Policy', to take adequate and effective steps for betterment of such underprivileged classes. State is bound to take adequate measures to provide education, health care, employment and even cultural opportunities and social standing to these deprived and underprivileged classes. It is not that Government has not taken steps in this direction from time to time. At the same time, however, harsh reality is that benefits of these schemes have not reached those persons for whom that are actually meant.

India has achieved significant economic growth since independence. In particular, rapid economic growth has been achieved in the last 25 years, after the country adopted the policy of liberalisation and entered the era of, what is known as, globalisation. Economic growth in the last decade has been

phenomenal and for many years, the Indian economy grew at highest rate in the world. At the same time, it is also a fact that in spite of significant political and economic success which has proved to be sound and sustainable, the benefits thereof have not percolated down to the poor and the poorest. In fact, such benefits are reaped primarily by rich and upper middle classes, resulting into widening the gap between the rich and the poor. Jean Dreze & Amartya Sen eithly narrate the position as under[50]:

> "Since India's recent record of fast economic growth is often celebrated, with good reason, it is extremely important to point to the fact that the societal reach of economic progress in India has been remarkably limited. It is not only that the income distribution has been getting more unequal in recent years (a characteristic that India shares with China), but also that the rapid rise in real wages in China from which the working classes have benefited greatly is not matched at all by India's relatively stagnant real wages. No less importantly, the public revenue generated by rapid economic growth has not been used to expand the social and physical infrastructure in a determined and well-planned way (in this India is left far behind by China). There is also a continued lack of essential social services (from schooling and health care to the provision of safe water and drainage) for a huge part of the population. As we will presently discuss, while India has been overtaking other countries in the progress of its real income, it has been overtaken in terms of social indicators by many of these countries, even within the region of South Asia itself (we go into this question more fully in Chapter 3, 'India in Comparative Perspective').
>
> To point to just one contrast, even though India has significantly caught up with China in terms of GDP growth, its progress has been very much slower than China's in indicators such as longevity, literacy, child undernourishment and maternal mortality. In South Asia itself, the much poorer economy of Bangladesh has caught up with and overtaken India in terms of many social indicators (including life expectancy, immunization of children, infant mortality, child undernourishment and girls' schooling). Even Nepal has been catching up, to the extent that it now has many social indicators similar to India's, in spite of its per capita GDP being just about one third. Whereas twenty years ago India generally had the second-best social indicators among the six South Asia countries (India, Pakistan, Bangladesh, Sri. Lanka, Nepal and Bhutan), it now looks second worst (ahead only of problem-ridden Pakistan). India has been climbing up the ladder of per capita income while slipping down the slope of social indicators."

It is in this context that not only sustainable development is needed which takes care of integrating growth and development, thereby ensuring that the benefit of economic growth is reaped by every citizen of this country, it also becomes the duty of the Government in a welfare State to come out with various welfare schemes which not only take care of immediate needs of the deprived class but also ensure that adequate opportunities are provided to such persons to enable them to make their lives better, economically as well as socially. As mentioned above, various welfare schemes are, in fact, devised and floated from time to time by the Government, keeping aside substantial amount of money earmarked for spending on socially and economically backward classes. However, for various reasons including corruption, actual benefit does not reach those who are supposed to receive such benefits. One of the main reasons is failure to identify these persons for lack of means by

which identity could be established of such genuine needy class. Resultantly, lots of ghosts and duplicate beneficiaries are able to take undue and impermissible benefits. A former Prime Minister of this country[51] has gone to record to say that out of one rupee spent by the Government for welfare of the downtrodden, only 15 paisa thereof actually reaches those persons for whom it is meant. It cannot be doubted that with UID/Aadhaar much of the malaise in this field can be taken care of.

(ii) Menace of corruption and black money has reached alarming proportion in this country. It is eating into the economic progress which the country is otherwise achieving. It is not necessary to go into the various reasons for this menace. However, it would be pertinent to comment that even as per the observations of the Special Investigation Team (SIT) on black money headed by Justice M.B. Shah, one of the reasons is that persons have the option to quote their PAN or UID or passport number or driving licence or any other proof of identity while entering into financial/business transactions. Because of this multiple methods of giving proofs of identity, there is no mechanism/system at present to collect the data available with each of the independent proofs of ID. For this reason, even SIT suggested that these databases be interconnected. To the same effect is the recommendation of the Committee headed by Chairman, CBDT on measures to tackle black money in India and abroad which also discusses the problem of money-laundering being done to evade taxes under the garb of shell companies by the persons who hold multiple bogus PAN numbers under different names or variations of their names. That can be possible if one uniform proof of identity, namely, UID is adopted. It may go a long way to check and minimise the said malaise.

(iii) Thirdly, Aadhaar or UID, which has come to be known as most advanced and sophisticated infrastructure, may facilitate law enforcement agencies to take care of problem of terrorism to some extent and may also be helpful in checking the crime and also help investigating agencies in cracking the crimes. No doubt, going by aforesaid, and may be some other similarly valid considerations, it is the intention of the Government to give phillip to Aadhaar movement and encourage the people of this country to enroll themselves under the Aadhaar scheme.

132. Wether such a scheme should remain voluntary or it can be made mandatory imposing compulsiveness on the people to be covered by Aadhaar is a different question which shall be addressed at the appropriate stage. At this juncture, it is only emphasised that malafides cannot be attributed to this scheme. In any case, we are concerned with the vires of Section 139AA of the Income Tax Act, 1961 which is a statutory provision. This Court is, thus, dealing with the aspect of judicial review of legislation. Insofar as this provision is concerned, the explanation of the respondents in the counter affidavit, which has already been reproduced above, is that the primary purpose of introducing this provision was to take care of the problem of multiple PAN cards obtained in fictitious names. Such multiple cards in fictitious names are obtained with the motive of indulging into money laundering, tax evasion, creation and channelising of black money. It is mentioned that in a de-duplication exercises, 11.35 lakhs cases of duplicate PANs/fraudulent PANs have been detected. Out of these, around 10.52 lakhs pertain to individual assessees. Parliament in its wisdom thought that one PAN to one person can be ensured by adopting Aadhaar for allottment of PAN to individuals. As of today, that is the only method available i.e. by seeding of existing PAN with Aadhaar. It is perceived as the best method, and the only robust method of de-duplication of PAN database. It is claimed by the respondents that the instance of duplicate Aadhaar is almost non-existent. It is also claimed that seeding of PAN with Aadhaar may contribute to widening of the tax case as well, by checking the tax

evasions and bringing in to tax hold those persons who are liable to pay tax but deliberately avoid doing so. It would be apposite to quote the following discussion by the Comptroller and Auditor General in its report for the year 2011:

"Widening of Tax Base

The assessee base grew over the last five years from 297.9 lakh taxpayers in 2005-06 to 340.9 lakh taxpayers in 2009-10 at the rate of 14.4 per cent.

The Department has different mechanisms available to enhance the assessee base which include inspection and survey, information sharing with other tax departments and third party information available in annual information returns. Automation also facilitates greater cross linking. Most of these mechanisms are available at the level of assessing officers. The Department needs to holistically harness these mechanisms at macro level to analyse the gaps in the assessee base. Permanent Account Numbers (PANs) issued upto March 2009 and March 2010 were 807.9 lakh and 958 lakh respectively. The returns filled in 2008-09 and 2009-10 were 326.5 lakh and 340.9 lakh respectively. The gap between PANs and the number of returns filed was 617.1 lakh in 2009-10. The Board needs to identify the reasons for the gap and use this information for appropriately enhancing the assessee base. **The gap may be due to issuance of duplicate PAN cards and death of some PAN card holders. The Department needs to put in place appropriate controls to weed out the duplicate PANs and also update the position in respect of deceased assessee. It is significant to note that the number of PAN card holders has increased by 117.7 per cent between 2005-06 to 2009-10 whereas the number of returns filed in the same period has increased by 14.4 per cent only.**

(emphasis supplied)

The total direct tax collection has increased by 128.8 per cent during the period 2005-06 to 2009-10. The increase in the tax collection was around nine times as compared to increase in the assessee base. It should be the constant endeavour of the Department to ensure that the entire assessee base, once correctly identified is duly meeting the entire tax liability. However, no assurance could be obtained that the tax liability on the assessee is being assessed and collected properly. This comment is corroborated in para 2.4.1 of Chapter 2 of this report where we have mentioned about our detection of under charge of tax amouting to Rs. 12,842.7 crore in 19,230 cases audited during 2008-09. However, given the fact that ours is a test audit, Department needs to take firm steps towards strengthening the controls available on the existing statutes towards deriving an assurance on the tax collections."

133. Likewise, the Finance Minister in his Budget speech in February, 2013 described the extent of tax evasion and offering lesser income tax than what is actually due thereby labelling India as tax known compliance, with the following figures:

"India's tax to GDP ratio is very law, and the proportion of direct tax to indirect tax is not optional from the view point of social justice. I place before you certain data to indicate that our direct tax collection is not commensurate with the income and consumption pattern of Indian economy. As against estimated 4.2 crore persons engaged in organized sector employment, the number of individuals filing return for salary income are only 1.74 crore. As against 5.6 crore informal sector individual enterprises and firms doing small business in India, the number of returns filed by this category are only 1.81 crore. Out of the 13.94 lakh companies registered in India up to 31th March, 2014, 5.97 lakh companies have filed their returns for Assessment Year 2016-17. Of the 5.97 lakh companies which have filed their returns for Assessment Year 2016-17 so far, as many as 2.76 lakh companies

have shown losses or zero income. 2.85 lakh companies have shown profit before tax of less than Rs. 1 crore. 28,667 companies have shown profit between Rs. 1 crore to Rs. 10 crore, and only 7781 companies have profit before tax of more than Rs. 10 crores. Among the 3.7 crore individuals who filed the tax returns in 2015-16, 99 lakh show income below the exemption limit of Rs. 2.5 Lakh p.a. 1.95 crore show income between Rs. 2.5 to Rs. 5 lakh, 52 lakh show income between Rs. 5 to Rs. 10 lakhs and only 24 lakh people show income above Rs. 10 lakhs. Of the 76 lakhs individual assesses who declare income above Rs. 5 lakhs, 56 lakhs are in the salaried class. The number of people showing income more than 50 lakhs in the entire country is only 1.72 lakh. We can contrast this with the fact that in the last five years, more than 1.25 crore cars have been sold, and number of Indian citizens who flew abroad, either for business or tourism, is 2 crore in the year 2015. From all these figures we can conclude that we are largely a tax non-compliant society. The predominance of the cash in the economy makes it possible for the people to evade their taxes. When too many people evade the taxes, the burden of their share falls on those who are honest and complaint."

134. The respondents have also claimed that linking of Aadhaar with PAN is consistent with India's international obligations and goals. In this behalf, it is pointed out that India has signed the Inter-Governmental Agreement (IGA) with the USA on July 9, 2015, for Improving International Tax Compliance and implementing the Foreign Account Tax Compliance Act (FATCA). India has also signed a multilateral agreement on June 3, 2015, to automatically exchange information based on Article 6 of the Convention on Mutual Administrative Assistance in Tax Matters under the Common Reporting Scheme (CRS), formally referred to as the Standard for Automatic Exchange of Financial Account Information (AEoI). As part of India's commitment under FATCA and CRS, financial sector entities capture the details about the customers using the PAN. In case the PAN or submitted details are found to be incorrect or fictitious, it will create major embarrassment for the country. Under Non-filers Monitoring System (NMS), Income Tax Department identifies non-filers with potential tax liabilities. Data analysis is carried out to identify non-filers about whom specific information was available in AIR, CIB data and TDS/TCS Returns. Email/SMS and letters are sent to the identified non-filers communicating the information summary and seeking to know the submission details of Income tax return. In a large number of cases (more than 10 lac PAN every year) it is seen that the PAN holder neither submits the response and in many cases the letters are return unserved. Field verification by fields formations have found that in a large number of cases, the PAN holder is untraceable. In many cases, the PAN holder mentions that the transaction does not relate to them. There is a need to strengthen PAN by linking it with Aadhaar/biometric information to prevent use of wrong PAN for high value transactions.

135. While considering the aforesaid submission of the petitioners, one has to keep in mind the aforesaid purpose of the impugned provision and what it seeks to achieve. The provision is aimed at seeding Aadhaar with PAN. We have already held, while considering the submission based on Article 14 of the Constitution, that the provision is based on reasonable classification and that has nexus with the objective sought to be achieved. One of the main objectives is to de-duplicate PAN cards and to bring a situation where one person is not having more than one PAN card or a person is not able to get PAN cards in assumed/fictitious names. In such a scenario, if those persons who violate Section 139AA of the Act without any consequence, the provision shall be rendered toothless. It is the prerogative of the Legislature to make penal provisions for violation of any law made by it. In the instant case, requirement of giving Aadhaar enrolment number to the designated authority or stating this number in the income tax returns is directly connected with the issue of duplicate/fake PANs.

136. At this juncture, we will also like to quote the following passages from the nine Judge Bench judgment of this Court in *Jindal Stainless Ltd.*[52], which discussion though is in different context, will have some relevance to the issue at hand as well:

"109. It was next argued on behalf of the dealers that an unreasonably high rate of tax could by itself constitute a restriction offensive to Article 301 of the Constitution. This was according to learned counsel for the dealers acknowledged even in the minority judgment delivered by Sinha, CJ in *Atiabari's case* (supra). If that be so, the only way such a restriction could meet the constitutional requirements would be through the medium of the proviso to Article 304(b) of the Constitution. There is, in our opinion, no merit in that contention either and we say so for two precise reasons. Firstly, because taxes whether high or low do not constitute restrictions on the freedom of trade and commerce. We have held so in the previous paragraphs of the judgment based on our textual understanding of the provisions of Part XIII which is matched by the contextual interpretation. That being so the mere fact that a tax casts a heavy burden is no reason for holding that it is a restriction on the freedom of trade and commerce. Any such excessive tax burden may be open to challenge under Part III of the Constitution but the extent of burden would not by itself justify the levy being struck down as a restriction contrary to Article 301 of the Constitution.

110. Secondly because, levy of taxes is both an attribute of sovereignty and an unavoidable necessity. No responsible government can do without levying and collecting taxes for it is only through taxes that governments are run and objectives of general public good achieved. The conceptual or juristic basis underlying the need for taxation has not, therefore, been disputed by learned counsel for the dealers and, in our opinion, rightly so. That taxation is essential for fulfilling the needs of the government is even otherwise well-settled. A reference to "A Treatise on the Constitutional Limitations" (8th Edn. 1927 - Vol. II Page 986) by Thomas M Cooley brings home the point with commendable clarity. Dealing with power of taxation Cooley says:

> "Taxes are defined to be burdens or charges imposed by the legislative power upon persons or property, to raise money for public purposes. The power to tax rests upon necessity, and is inherent in every sovereignty. The legislature of every free State will possess it under the general grant of legislative power, whether particularly specified in the constitution among the powers to be exercised by it or not. No constitutional government can exist without it, and no arbitrary government without regular and steady taxation could be anything but an oppressive and vexatious despotism, since the only alternative to taxation would be a forced extortion for the needs of government from such persons or objects as the men in power might select as victims."

111. Reference may also be made to the following passage appearing in *McCulloch* v. *Maryland*, 17 US 316 (1819) where Chief Justice Marshall recognized the power of taxation and pointed out that the only security against the abuse of such power lies in the structure of the government itself. The court said:

> "43. ..It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation.
>
> 44. The people of a State, therefore, give to their government a right of taxing themselves and their property; and as the exigencies of the government cannot

be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse."

112. To the same effect is the decision of this Court in *State of Madras* v. *N.K. Nataraja Mudaliar* (AIR 1969 SC 147) where this Court recognized that political and economic forces would operate against the levy of an unduly high rate of tax. The Court said:

"16.... Again, in a democratic constitution political forces would operate against the levy of an unduly high rate of tax. The rate of tax on sales of a commodity may not ordinarily be based on arbitrary considerations, but in the light of the facility of trade in a particular commodity, the market conditions internal and external - and the likelihood of consumers not being scared away by the price which includes a high rate of tax. Attention must also be directed sub-Section (5) of Section 8 which authorizes the State Government, notwithstanding anything contained in Section 8, in the public interest to waive tax or impose tax on sales at a lower rate on inter-State trade or commerce. It is clear that the legislature has contemplated that elasticity of rates consistent with economic forces is clearly intended to be maintained."

137. Therefore, it cannot be denied that there has to be some provision stating the consequences for not complying with the requirements of Section 139AA of the Act, more particularly when these requirements are found as not violative of Articles 14 and 19 (of course, eschewing the discussion on Article 21 herein for the reasons already given). If Aadhar number is not given, the aforesaid exercise may not be possible.

138. Having said so, it becomes clear from the aforesaid discussion that those who are not PAN holders, while applying for PAN, they are required to give Aadhaar number. This is the stipulation of sub-section (1) of Section 139AA, which we have already upheld. At the same time, as far as existing PAN holders are concerned, since the impugned provisions are yet to be considered on the touchstone of Article 21 of the Constitution, including on the debate around Right to Privacy and human dignity, etc. as limbs of Article 21, we are of the opinion that till the aforesaid aspect of Article 21 is decided by the Constitution Bench a partial stay of the aforesaid proviso is necessary. Those who have already enrolled themselves under Aadhaar scheme would comply with the requirement of sub-section (2) of Section 139AA of the Act. Those who still want to enrol are free to do so. However, those assessees who are not Aadhaar card holders and do not comply with the provision of Section 139(2), their PAN cards be not treated as invalid for the time being. It is only to facilitate other transactions which are mentioned in Rule 114B of the Rules. We are adopting this course of action for more than one reason. We are saying so because of very severe consequences that entail in not adhering to the requirement of sub-section (2) of Section 139AA of the Act. A person who is holder of PAN and if his PAN is invalidated, he is bound to suffer immensely in his day to day dealings, which situation should be avoided till the Constitution Bench authoritatively determines the argument of Article 21 of the Constitution. Since we are adopting this course of action, in the interregnum, it would be permissible for the Parliament to consider as to whether there is a need to tone down the effect of the said proviso by limiting the consequences.

139. However, at the same time, we find that proviso to Section 139AA(2) cannot be read retrospectively. If failure to intimate the Aadhaar number renders PAN void *ab initio* with the deeming provision that the PAN allotted would be invalid as if the person had not applied for allotment of PAN would have rippling effect of unsettling settled rights of the parties. It has the effect of undoing all the acts done by a person on the basis of such a PAN. It may have even the effect of incurring other penal

consequences under the Act for earlier period on the ground that there was no PAN registration by a particular assessee. The rights which are already accrued to a person in law cannot be taken away. Therefore, this provision needs to be read down by making it clear that it would operate prospectively.

140. Before we part with, few comments are needed, as we feel that these are absolutely essential:

(i) Validity of Aadhaar, whether it is under the Aadhaar scheme or the Aadhaar Act, is already under challenge on the touchstone of Article 21 of the Constitution. Various facets of Article 21 are pressed into service. First and foremost is that it violates Right to Privacy and Right to Privacy is part of Article 21 of the Constitution. Secondly, it is also argued that it violates human dignity which is another aspect of Article 21 of the Constitution. Since the said matter has already been referred to the Constitution Bench, we have consciously avoided discussion, though submissions in this behalf have been taken note of. We feel that all the aspect of Article 21 needs to be dealt with by the Constitution Bench. That is a reason we have deliberately refrained from entering into the said arena.

(ii) It was submitted by the counsel for the petitioners themselves that they would be confining their challenge to the impugned provision on Articles 14 and 19 of the Constitution as well as competence of the Legislature, while addressing the arguments, other facets of Article 21 of the Constitution were also touched upon. Since we are holding that Section 139AA of the Income Tax Act is not violative of Articles 14 and 19(1)(g) of the Constitution and also that there was no impediment in the way of Parliament to insert such a statutory provision (subject to reading down the proviso to sub-section (2) of Section 139AA of the Act as given above), we make it clear that the impugned provision has passed the muster of Articles 14 and 19(1)(g) of the Constitution. However, more stringent test as to whether this statutory provision violates Article 21 or not is yet to be qualified. Therefore, we make it clear that Constitutional validity of this provision is upheld subject to the outcome of batch of petitions referred to the Constitution Bench where the said issue is to be examined.

(iii) It is also necessary to highlight that a large section of citizens feel concerned about possible data leak, even when many of those support linkage of PAN with Aadhaar. This is a concern which needs to be addressed by the Government. It is important that the aforesaid apprehensions are assuaged by taking proper measures so that confidence is instilled among the public at large that there is no chance of unauthorised leakage of data whether it is done by tightening the operations of the contractors who are given the job of enrollment, they being private persons or by prescribing severe penalties to those who are found guilty of leaking the details, is the outlook of the Government. However, we emphasise that measures in this behalf are absolutely essential and it would be in the fitness of things that proper scheme in this behalf is devised at the earliest.

141. Subject to the aforesaid, these writ petitions are disposed of in the following manner:

(i) We hold that the Parliament was fully competent to enact Section 139AA of the Act and its authority to make this law was not diluted by the orders of this Court.

(ii) We do not find any conflict between the provisions of Aadhaar Act and Section 139AA of the Income Tax Act inasmuch as when interpreted harmoniously, they operate in distinct fields.

(iii) Section 139AA of the Act is not discriminatory nor it offends equality clause enshrined in Article 14 of the Constitution.

(iv) Section 139AA is also not violative of Article 19(1)(g) of the Constitution insofar as it mandates giving of Aadhaar enrollment number for applying PAN

cards in the income tax returns or notified Aadhaar enrollment number to the designated authorities. Further, proviso to sub-section (2) thereof has to be read down to mean that it would operate only prospective.

(v) The validity of the provision upheld in the aforesaid manner is subject to passing the muster of Article 21 of the Constitution, which is the issue before the Constitution Bench in Writ Petition (Civil) No. 494 of 2012 and other connected matters. Till then, there shall remain a partial stay on the operation of proviso to sub-section (2) of Section 139AA of the Act, as described above.

142. No costs.

SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS
WRIT PETITION(C)247 OF 2017

Binoy Viswam.....Petitioner(s)

v.

Union of India & Ors.....Respondent(s)

With
WP(C) No. 277/2017
WP(C) No. 304/2017

Date: 09/06/2017 These petitions were called on for judgment today.

For Petitioner(s) Mr. Salman Khurshid, Sr. Adv.
Mr. Vishnu Shankar Jain, Adv.
Mr. Deepak Joshi, Adv.
Mr. I.K.M. Mairom, Adv.
Mr. Sriram P., Adv.
Mr. Pratap Venugopal, Adv.
Ms. Surekha Raman, Adv.
Mr. Udayaditya Banerjee, Adv.
Mr. Prasanna S., Adv.
Ms. Niharika, Adv.
Ms. Sameeksha G., Adv.
Mr. Apaar Gupta, Adv.
For M/s. K.J. John & Co., Adv.
Mr. Anando Mukherjee, Adv.

For Respondent(s) Ms. Sadhna Sandhu, Adv.
Ms. Rashmi Malhotra, Adv.
Mr. Zoheb Hossain, Adv.
Mr. Arghya Sengupta, Adv.
Ms. Ranjeeta Rohatgi, Adv.
Mr. Ritesh Kumar, Adv.
Mr. Abhinav Mukherji, Adv.
Mr. Saurabh Kirpal, Adv.
Mr. A. Gulati, Adv.
Ms. Anil Katiyar, Adv.

143. Hon'ble Mr. Justice A.K. Sikri pronounced the judgment of the Bench comprising His Lordship and Hon'ble Mr. Justice Ashok Bhushan.

144. These writ petitions are disposed of in the following manner:

(i) We hold that the Parliament was fully competent to enact Section 139AA of the Act and its authority to make this law was not diluted by the orders of this Court.

(ii) We do not find any conflict between the provisions of Aadhaar Act and Section 139AA of the Income Tax Act inasmuch as when interpreted harmoniously, they operate in distinct fields.

(iii) Section 139AA of the Act is not discriminatory nor it offends equality clause enshrined in Article 14 of the Constitution.

(iv) Section 139AA is also not violative of Article 19(1)(g) of the Constitution insofar as it mandates giving of Aadhaar enrollment number for applying PAN cards in the income tax returns or notified Aadhaar enrollment number to the designated authorities. Further, proviso to sub-section (2) thereof has to be read down to mean that it would operate only prospective.

(v) The validity of the provision upheld in the aforesaid manner is subject to passing the muster of Article 21 of the Constitution, which is the issue before the Constitution Bench in Writ Petition (Civil) No. 494 of 2012 and other connected matters. Till then, there shall remain a partial stay on the operation of proviso to sub-section (2) of Section 139AA of the Act, as described above.

145. No costs.

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[1] AIR 1954 SC 300

[2] AIR 1963 SC 1295

[3] (1955) 2 SCR 225

[4] AIR 1978 SC 803

[5] (2003) 5 SCC 298

[6] (1959) SCR 279

[7] (2016) 7 SCC 353

[8] Footnote 6 above

[9] AIR 1967 SC 1170 : (1967) 2 SCR 454

[10] (2014) 5 SCC 438

[11] (1978) 4 SCC 494

[12] (2011) 4 SCC 454

[13] (1973) 1 SCC 500

[14] (2014) 8 SCC 682

[15] (2006) 8 SCC 212

[16] (1975) 2 SCC 148

[17] (2008) 3 SCC 1

[18] (1966) 3 SCR 275

[19] 410 U.S. 113 (1973)

[20] (2003) 4 SCC 493

[21] (2011) 9 SCC 146

[22] (2012) 6 SCC 312

[23] (1996) 1 SCC 345

[24] (1995) 5 SCC 96

[25] AIR 1958 SC 731

[26] (1990) 1 SCC 109

[27] (2016) 6 SCC 602

[28] (2011) 14 SCC 331

[29] (2013) 2 SCC 705

[30] (2013) 14 SCC 368

[31] (2010) 5 SCC 318

[32] Writ Petition (C) No. 607 of 2016 decided on February 06, 2017

[33] Footnote 7 above

[34] (1994) 6 SCC 632

[35] 489 U.S. 749 (1989)

[36] (2009) 2 SCC 121

[37] Footnote 20 above

[38] (2008) 6 SCC 1

[39] (1996) 3 SCC 709

[40] (2016) 2 SCC 445

[41] Footnote 19 above.

[42] (2016) 11 Scale 1

[43] Footnote 9 above

[44] (1971) 1 SCC 442

[45] (1992) 2 SCC 643

[46] 1950 SCR 869

[47] (1974) 4 SCC 3

[48] Footnote 7 above

[49] Footnote 7 above

[50] An Uncertain Glory: India and its Contradictions

[51] Late Shri Rajiv Gandhi

[52] Footnote 40 above

(2003) 4 Supreme Court Cases 399

(BEFORE M.B. SHAH, P. VENKATARAMA REDDI AND D.M. DHARMADHIKARI, JJ.)

Writ Petition (C) No. 490 of 2002†

PEOPLE'S UNION FOR CIVIL LIBERTIES (PUCL) AND ANOTHER .. Petitioners;

Versus

UNION OF INDIA AND ANOTHER .. Respondents.

With

Writ Petition (C) No. 509 of 2002

LOK SATTA AND OTHERS .. Petitioners;

Versus

UNION OF INDIA .. Respondent.

And

Writ Petition (C) No. 515 of 2002

ASSOCIATION FOR DEMOCRATIC REFORMS .. Petitioner;

Versus

UNION OF INDIA AND ANOTHER .. Respondents.

Writ Petitions (C) No. 490 of 2002 with Nos. 509 and 515 of 2002, decided on March 13, 2003

A. **Election — Representation of the People Act, 1951 — S. 33-B [as inserted by Representation of the People (Third Amendment) Act, 2002] — Held, invalid**

The Supreme Court in *Union of India* v. *Assn. for Democratic Reforms*, (2002) 5 SCC 294 at para 48 gave the following directions:

"*48.* The Election Commission is directed to call for information on affidavit by issuing necessary order in exercise of its power under Article 324 of the Constitution of India from each candidate seeking election to Parliament or a State Legislature as a necessary part of his nomination paper, furnishing therein, information on the following aspects in relation to his/her candidature:

(*1*) Whether the candidate is convicted/acquitted/discharged of any criminal offence in the past — if any, whether he is punished with imprisonment or fine.

(*2*) Prior to six months of filing of nomination, whether the candidate is accused in any pending case, of any offence punishable with imprisonment for two years or more, and in which charge is framed or cognizance is taken by the court of law. If so, the details thereof.

(*3*) The assets (immovable, movable, bank balance etc.) of a candidate and of his/her spouse and that of dependants.

(*4*) Liabilities, if any, particularly whether there are any overdues of any public financial institution or government dues.

† Under Article 32 of the Constitution of India

(*5*) The educational qualifications of the candidate."

Subsequently, the Representation of the People (Amendment) Ordinance, 2002 (4 of 2002)‡ was promulgated on 24-8-2002. The Ordinance was later replaced by the Representation of the People (Third Amendment) Act, 2002 (72 of 2002)‡‡ which received the assent of the President on Dec. 28, 2002. Sections 33-A and 33-B as inserted by the said Amending Act read as under:

"33-A. *Right to information.*—(1) A candidate shall, apart from any information which he is required to furnish, under this Act or the rules made thereunder, in his nomination paper delivered under sub-section (1) of Section 33, also furnish the information as to whether—

(*i*) he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the court of competent jurisdiction;

(*ii*) he has been convicted of an offence other than any offence referred to in sub-section (1) or sub-section (2), or covered in sub-section (3), of Section 8 and sentenced to imprisonment for one year or more.

(2) The candidate or his proposer, as the case may be, shall, at the time of delivering to the Returning Officer the nomination paper under sub-section (1) of Section 33, also deliver to him an affidavit sworn by the candidate in a prescribed form verifying the information specified in sub-section (1).

(3) The Returning Officer shall, as soon as may be after the furnishing of information to him under sub-section (1), display the aforesaid information by affixing a copy of the affidavit, delivered under sub-section (2), at a conspicuous place at his office for the information of the electors relating to a constituency for which the nomination paper is delivered.

33-B. *Candidate to furnish information only under the Act and the rules.*—Notwithstanding anything contained in any judgment, decree or order of any court or any direction, order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under this Act or the rules made thereunder."

Thus a candidate is not required to disclose (*a*) the cases in which he is acquitted or discharged of criminal offence(s); (*b*) his assets and liabilities; and (*c*) his educational qualification. In the present writ petitions, the validity of Section 33-B has been challenged. It was submitted by the petitioners that Section 33-B on the face of it is arbitrary, unjustifiable and void being violative of the fundamental right of the citizens/voters to know the antecedents of the candidates. Without exercise of that right it would not be possible to have free and fair elections and therefore, the impugned section violates the very basic features of the Constitution, namely, republic democracy. For having free and fair elections, anywhere in the territory of India, it is necessary to give effect to the voters' fundamental right as declared by the Supreme Court in the above judgment. It was contended that by issuing the Ordinance the Government has arrogated to itself the power to decide unilaterally for nullifying the decision rendered by the Supreme Court without considering whether it can pass

‡ **Ed.**: See full text at 2003 Current Central Legislation, Pt. II, at p. 3

‡‡ **Ed.**: See full text at 2003 Current Central Legislation, Pt. II, at p. 131

legislation which abridges fundamental right guaranteed under Article 19(1)(*a*). On the other hand it was submitted on behalf of the respondents that the aforesaid Ordinance/Amended Act is in consonance with the judgment rendered by the Supreme Court and the vacuum pointed out by the said judgment is filled in by the enactment. It was also contended that voters' right to know the antecedents of the candidate is not part of the fundamental rights, but it is a derivative fundamental right on the basis of interpretation of Article 19(1)(*a*) given by the Supreme Court. It was submitted that the Ordinance/Amended Act is in public interest and, therefore, it cannot be held to be illegal or void.

Disposing of the writ petitions, the Supreme Court

Held :

Per Shah, J. *(Dharmadhikari, J. concurring)*

Section 33-B of the amended Act is held to be illegal, null and void. However, this judgment would not have any retrospective effect but would be prospective. (Para 79)

Per Reddi, J. *(concurring)*

Section 33-B of the Representation of the People Act, 1951 does not pass the test of constitutionality. (Para 80)

B. **Election — Representation of the People Act, 1951 — S. 33-B [as inserted by Representation of the People (Third Amendment) Act, 2002] — Held, per curiam, invalid — Supreme Court in *Union of India* v. *Assn. for Democratic Reforms*, (2002) 5 SCC 294 directing Election Commission to call for from the prospective candidates for election information relating to criminal background of the candidate and initiation or pendency of criminal cases or proceedings against him, his assets and liabilities and his educational qualification — But by virtue of the Amendment Act, a candidate is not required to disclose the cases in which he is acquitted and discharged of criminal offences, his assets and liabilities and his educational qualification — Held, per Shah, J., once Supreme Court in *Assn. for Democratic Reforms case* has held that a voter has right under Art. 19(1)(a) to know the antecedents of the candidate, that right can be restricted by passing such legislation only as covered by Art. 19(2) — But S. 33-B cannot be justified or saved under Art. 19(2) — It is also not open to the legislature to nullify the decision of Supreme Court on ground that right to know antecedents of voters is only a derivative right and not a specific fundamental right — Hence, S. 33-B is ultra vires Art. 19(1)(a) — Directives of Supreme Court do not impinge upon right to privacy of the candidates — Held, per Reddi, J. (concurring), directives issued to Election Commission by Supreme Court in *Assn. for Democratic Reforms case* regarding disclosure of certain information about a candidate's antecedents in view of voters' right under Art. 19(1)(a) to have such information were pro tempore or tentative in nature, intended to operate till law made in that regard by legislature considering those directives as broad indicators or parameters — While making the law legislature should have given due weight to those directions and a substantial departure therefrom was not permissible — Court in exercise of power of judicial review has to take a holistic view and adopt a balanced approach in ascertaining whether the information required by the legislation to be disclosed by the candidate are reasonably adequate — Amendment Act has not provided for disclosure of information**

in respect of certain crucial aspects as pointed out by Supreme Court in *Assn. for Democratic Reforms case* and S. 33-B imposed a blanket ban on disclosure of information other than those required by the Amendment Act — S. 33-B thus nullified substantially the said directives of the Supreme Court and hence violative of Art. 19(1)(a) — Held, per Dharmadhikari, J. (concurring), S. 33-B is deficient in ensuring free and fair elections which is basic structure of the Constitution and hence liable to be struck down so as to revive the law declared by Supreme Court in *Assn. for Democratic Reforms case* — Constitution of India, Arts. 19(1)(a) & (2) and 21 — Citizen's right to know or right to information versus right to privacy of candidates

C. Election — Representation of the People Act, 1951 — S. 75-A [as inserted by Representation of the People (Third Amendment) Act, 2002] — Whether failed to effectuate the right to information and freedom of expression of voters/citizens in respect of assets and liabilities of candidates

D. Constitution of India — Art. 19(1)(a) — "Freedom of expression" — Nature and scope of — Voting at an election is a form of expression — Words and phrases — "Freedom of expression"

E. Constitution of India — Pt. III — Generally — Fundamental rights discovered by Supreme Court by expansive interpretation whether can be ignored as derivative rights — Fundamental rights are dynamic concepts having no fixed contents and Court expands them in the changing context so as to make them vibrant and lively — Therefore, expansive meaning given to these rights by Court are equally enforceable and cannot be ignored by the legislature on ground of being derivative rights — Expansive interpretation of Art. 19(1)(a) noticed — Right to information is an integral part of Art. 19(1)(a)

F. Statute Law — Overriding effect — Validating law — Legislature cannot override decision of court by empowering instrumentalities of the State to disobey the same — But legislature can change the basis of the decision prospectively or retrospectively or remove the defect pointed out by the court so as to render the decision ineffective

It was submitted that by the impugned legislation, most of the directions issued by the Supreme Court in *Assn. for Democratic Reforms case* are complied with and vacuum pointed out is filled in by the legislation and that the legislature did not think it fit that the remaining information as directed by the Court is required to be given by a contesting candidate.

Held :

Per Shah, J.

Section 33-B, which provides that notwithstanding anything contained in the judgment of any court or directions issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information in respect of his election which is not required to be disclosed or furnished under the Act or the rules made thereunder, is on the face of it beyond the legislative competence, as the Supreme Court has held that the voter has a fundamental right under Article 19(1)(*a*) to know the antecedents of a candidate for various reasons recorded in the earlier judgment as well as in this judgment. The amended Act does not wholly cover the directions issued by the Supreme Court. On the contrary, it provides that a candidate would not be bound to furnish certain

information as directed by the Supreme Court. Once the Supreme Court held that a voter has a fundamental right to know the antecedents of his candidate, that fundamental right under Article 19(1)(*a*) could be abridged by passing such legislation only as provided under Article 19(2). So legislative competence to interfere with a fundamental right enshrined in Article 19(1)(*a*) is limited as provided under Article 19(2). It has not been pointed out how the impugned legislation could be justified or saved under Article 19(2). (Paras 78, 38 to 40)

The legislature has no power to review the decision of the Supreme Court and set it at naught. The legislature has no power to ask the instrumentalities of the State to disobey or disregard the decisions given by the court. A declaration that an order made by a court of law is void is normally a part of the judicial function. The legislature cannot declare that decision rendered by the court is not binding, void or is of no effect. The legislature can with retrospective effect change the basis on which a decision is rendered by a court and change the law in general. However, this power can be exercised subject to constitutional provision, particularly, legislative competence and if it is violative of fundamental rights enshrined in Part III of the Constitution, such law would be void as provided under Article 13 of the Constitution. (Paras 34, 78 and 37)

Municipal Corpn. of the City of Ahmedabad v. *New Shrock Spg. and Wvg. Co. Ltd.*, (1970) 2 SCC 280; *Indira Nehru Gandhi* v. *Raj Narain*, 1975 Supp SCC 1; *P. Sambamurthy* v. *State of A.P.*, (1987) 1 SCC 362 : (1987) 2 ATC 502; *Cauvery Water Disputes Tribunal, In re*, 1993 Supp (1) SCC 96 (2); *Mahal Chand Sethia* v. *State of W.B.*, 1969 UJ (SC) 616, *relied on*

Shri Prithvi Cotton Mills Ltd. v. *Broach Borough Municipality*, (1969) 2 SCC 283, *cited*

It is not possible to accept the submission that as there is no specific fundamental right of the voter to know the antecedents of a candidate, the declaration by the Supreme Court of such fundamental right can be held to be derivative and therefore, it was open to the legislature to nullify it by appropriate legislation. There is no such concept of derivative fundamental rights. It is established that fundamental rights themselves have no fixed content, most of them are empty vessels into which each generation must pour its content in the light of its experience. The attempt of the court should be to expand the reach and ambit of the fundamental rights by process of judicial interpretation. The Constitution is required to be kept young, energetic and alive. Therefore, as the phrase "freedom of speech and expression" is given the meaning to include citizens' right to know the antecedents of the candidates contesting election of MP or MLA, such rights could not be set at naught by the legislature.

(Paras 41, 42, 78 and 55)

Unni Krishnan, J.P. v. *State of A.P.*, (1993) 1 SCC 645; *P.V. Narasimha Rao* v. *State (CBI/SPE)*, (1998) 4 SCC 626 : 1998 SCC (Cri) 1108; *C. Narayanaswamy* v. *C.K. Jaffer Sharief*, 1994 Supp (3) SCC 170; *T.N. Seshan, CEC of India* v. *Union of India*, (1995) 4 SCC 611, *relied on*

Kesavananda Bharati v. *State of Kerala*, (1973) 4 SCC 225; *Pathumma* v. *State of Kerala*, (1978) 2 SCC 1; *Missouri* v. *Holland*, 252 US 416, 433 : 64 L Ed 641 (1919); *Satwant Singh Sawhney* v. *D. Ramarathnam, A.P.O.*, AIR 1967 SC 1836 : (1967) 3 SCR 525; *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468; *Griswold* v. *Connecticut*, 381 US 479 : 14 L Ed 2d 510 (1965); *Sunil Batra* v. *Delhi Admn.*, (1978) 4 SCC 494 : 1979 SCC (Cri) 155; *Charles Sobraj* v. *Supdt., Central Jail*, (1978) 4 SCC 104 : 1978 SCC (Cri) 542; *Madhav Hayawadanrao Hoskot* v. *State of Maharashtra*, (1978) 3 SCC 544 : 1978 SCC (Cri) 468; *Hussainara Khatoon (I)* v. *Home Secy., State of Bihar*, (1980) 1 SCC 81 : 1980 SCC (Cri) 23; *Prem Shankar Shukla* v. *Delhi Admn.*, (1980) 3

SCC 526 : 1980 SCC (Cri) 815; *T.V. Vatheeswaran* v. *State of T.N.*, (1983) 2 SCC 68 : 1983 SCC (Cri) 342; *Sheela Barse* v. *State of Maharashtra*, (1983) 2 SCC 96 : 1983 SCC (Cri) 353; *Attorney General of India* v. *Lachma Devi*, 1989 Supp (1) SCC 264 : 1989 SCC (Cri) 413; *Parmanand Katara* v. *Union of India*, (1989) 4 SCC 286 : 1989 SCC (Cri) 721; *Shantistar Builders* v. *Narayan Khimalal Totame*, (1990) 1 SCC 520; *Brij Bhushan* v. *State of Delhi*, AIR 1950 SC 129 : (1950) 51 Cri LJ 1525; *Hamdard Dawakhana* v. *Union of India*, AIR 1960 SC 554 : 1960 Cri LJ 735; *Sakal Papers (P) Ltd.* v. *Union of India*, AIR 1962 SC 305; *Bennett Coleman and Co.* v. *Union of India*, (1972) 2 SCC 788; *Odyssey Communications (P) Ltd.* v. *Lokvidayan Sanghatana*, (1988) 3 SCC 410; *S. Rangarajan* v. *P. Jagjivan Ram*, (1989) 2 SCC 574; *LIC of India* v. *Manubhai D. Shah*, (1992) 3 SCC 637; *Dinesh Trivedi, MP* v. *Union of India*, (1997) 4 SCC 306; *Sub-Committee on Judicial Accountability* v. *Union of India*, (1991) 4 SCC 699, *referred to*

By declaration of a fact, which is a matter of public record, that a candidate was involved in various criminal cases, there is no question of infringement of any right of privacy. Similarly, with regard to the declaration of assets also, a person having assets or income is normally required to disclose the same under the Income Tax Act or such similar fiscal legislation. Not only this, once a person becomes a candidate to acquire public office, such declaration would not affect his right of privacy. This is the necessity of the day because of statutory provisions of controlling widespread corrupt practices as repeatedly pointed out by all concerned including various reports of the Law Commission and other committees. (Para 47)

R. Rajagopal v. *State of T.N.*, (1994) 6 SCC 632, *explained* and *distinguished*

Kharak Singh v. *State of U.P.*, AIR 1963 SC 1295 : (1964) 1 SCR 332 : (1963) 2 Cri LJ 329; *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468, *referred to*

B.R. Kapur v. *State of T.N.*, (2001) 7 SCC 231; *Common Cause* v. *Union of India*, (1996) 2 SCC 752, *relied on*

Per Reddi, J. *(concurring and partly dissenting)*

The directives given by the Supreme Court in *Union of India* v. *Assn. for Democratic Reforms* were intended to operate only till the law was made by the legislature and in that sense "pro tempore" in nature. Once legislation is made, the Court has to make an independent assessment in order to evaluate whether the items of information statutorily ordained are reasonably adequate to secure the right of information available to the voter/citizen. In embarking on this exercise, the points of disclosure indicated by the Supreme Court, even if they be tentative or ad hoc in nature, should be given due weight and substantial departure therefrom cannot be countenanced. If the legislature in utter disregard of the indicators enunciated by the Supreme Court proceeds to make a legislation providing only for a semblance or pittance of information or omits to provide for disclosure on certain essential points, the law would then fail to pass muster of Article 19(1)(*a*). Though certain amount of deviation from the aspects of disclosure spelt out by the Supreme Court is not impermissible, a substantial departure cannot be countenanced. The legislative provision should be such as to promote the right to information to a reasonable extent, if not to the fullest extent on details of concern to the voters and citizens at large. While enacting the legislation, the legislature has to ensure that the fundamental right to know about the candidate is reasonably secured and information which is crucial, by any objective standards, is not denied. It is for the constitutional court in exercise of its judicial review power to judge whether the areas of disclosure carved out by the legislature are reasonably adequate to safeguard the citizens' right to information. (Paras 123 and 109)

The Court has to take a holistic view and adopt a balanced approach in examining the legislation providing for right to information and laying down the parameters of that right. The Court has to keep in view the twin principles that the citizens' right to information to know about the personal details of a candidate is not an unlimited right and that at any rate, it has no fixed concept and the legislature has freedom to choose between two reasonable alternatives. It is not a proper approach to test the validity of legislation only from the standpoint whether the legislation implicitly and word to word gives effect to the directives issued by the Court as an ad hoc measure when the field was unoccupied by legislation. (Paras 123 and 109)

Section 33-B inserted by the Representation of the People (Third Amendment) Act, 2002 does not pass the test of constitutionality, firstly, for the reason that it imposes a blanket ban on dissemination of information other than that spelt out in the enactment irrespective of the need of the hour and the future exigencies and expedients. The concept of freedom of speech and expression does not remain static. The felt necessities of the times coupled with experiences drawn from the past may give rise to the need to insist on additional information on the aspects not provided for by law. New situations and the march of events may demand the flow of additional facets of information. The right to information should be allowed to grow rather than being frozen and stagnant; but the mandate of Section 33-B prefaced by the non obstante clause impedes the flow of such information conducive to the freedom of expression. In the face of the prohibition under Section 33-B, the Election Commission which is entrusted with the function of monitoring and supervising the election process will have to sit back with a sense of helplessness in spite of the pressing need for insisting on additional information. Even the Court may at times feel handicapped in taking necessary remedial steps to enforce the right to information. The legislative injunction curtailing the nature of information to be furnished by the contesting candidates only to the specific matters provided for by the legislation and nothing more would emasculate the fundamental right to freedom of expression of which the right to information is a part. The very objective of recognizing the right to information as part of the fundamental right under Article 19(1)(*a*) in order to ensure free and fair elections would be frustrated if the ban prescribed by Section 33-B is taken to its logical effect. The second reason is that the ban operates despite the fact that the disclosure of information now provided for is deficient and inadequate by blocking the ambit of disclosures only to what has been specifically provided for by the amendment, Parliament failed to give effect to one of the vital aspects of information viz. disclosure of assets and liabilities and thus failed in substantial measure to give effect to the right to information as a part of the freedom of expression. Parliament has unduly restricted the ambit of information which the citizens should have and thereby impinged on the guarantee enshrined in Article 19(1)(*a*). (Paras 123, 110 and 111)

It is a settled principle of constitutional jurisprudence that the only way to render a judicial decision ineffective is to enact a valid law by way of amendment or otherwise fundamentally altering the basis of the judgment either prospectively or retrospectively. The legislature cannot overrule or supersede a judgment of the Court without lawfully removing the defect or infirmity pointed out by the Court because it is obvious that the legislature cannot trench on the judicial power vested in the courts. Parliament did not by law provide for disclosure of information on certain crucial points such as assets and liabilities

and at the same time, placed an embargo on calling for further informations by enacting Section 33-B. That is where Section 33-B of the impugned amendment Act does not pass the muster of Article 19(1)(*a*), as interpreted by the Supreme Court. (Paras 112 and 113) *a*

The right to information provided for by Parliament under Section 33-A in regard to the pending criminal cases and past involvement in such cases is reasonably adequate to safeguard the right to information vested in the voter/citizen. However, there is no good reason for excluding the pending cases in which cognizance has been taken by the Court from the ambit of disclosure. (Para 123) *b*

The provision made in Section 75-A regarding declaration of assets and liabilities of the elected candidates to the Speaker or the Chairman of the House has failed to effectuate the right to information and the freedom of expression of the voters/citizens. Having accepted the need to insist on disclosure of assets and liabilities of the elected candidate together with those of the spouse or dependent children, Parliament ought to have made a provision for furnishing this *c* information at the time of filing the nomination. Failure to do so has resulted in the violation of guarantee under Article 19(1)(*a*). By calling upon the contesting candidate to disclose the assets and liabilities of his/her spouse, the fundamental right to information of a voter/citizen is thereby promoted. When there is a competition between the right to privacy of an individual and the right to information of the citizens, the former right has to be subordinated to the latter right as it serves the larger public interest. The right to know about the candidate *d* who intends to become a public figure and a representative of the people would not be effective and real if only truncated information of the assets and liabilities is given. It cannot be denied that the family relationship and social order in our country is such that the husband and wife look to the properties held by them as belonging to the family for all practical purposes, though in the eye of the law the properties may distinctly belong to each of them. By and large, there exists a *e* sort of unity of interest in the properties held by spouses. The property being kept in the name of the spouse *benami* is not unknown in our country. In this situation, it could be said that a countervailing or paramount interest is involved in requiring a candidate who chooses to subject himself/herself to public gaze and scrutiny to furnish the details of assets and liabilities of the spouse as well. That is one way of looking at the problem. More important, it is to be noted that Parliament itself accepted in principle that not only the assets of the elected *f* candidates but also his or her spouse and dependent children should be disclosed to the constitutional authority and the right of privacy should not come in the way of such disclosure; but, the hitch lies in the fact that the disclosure has to be made to the Speaker or Chairman of the House after he or she is elected. No provision has been made for giving access to the details filed with the presiding officer of the House. By doing so, Parliament has omitted to give effect to the *g* principle, which it rightly accepted as a step in aid to promote integrity in public life. Having accepted the need to insist on disclosure of assets and liabilities of the elected candidate together with those of other family members, Parliament refrained from making a provision for furnishing the information at the time of filing the nomination. This has resulted in jeopardizing the right to information implicitly guaranteed by Article 19(1)(*a*). Therefore, the provision made in Section 75-A regarding declaration of assets and liabilities of the elected *h*

candidates to the presiding officer has failed to effectuate the right to information and the freedom of expression of the voters/citizens. (Paras 123 and 121)

The failure to provide for disclosure of educational qualification does not, however, in practical terms, infringe the freedom of expression. Consistent with the principle of adult suffrage, the Constitution has not prescribed any educational qualification for being Member of the House of the People or Legislative Assembly. That apart, the information relating to educational qualifications of contesting candidates does not serve any useful purpose in the present context and scenario. The information regarding educational qualifications is not a vital and useful piece of information to the voter, in the ultimate analysis. At any rate, two views are reasonably possible. Therefore, it is not possible to hold that Parliament should have necessarily made the provision for disclosure of information regarding educational qualifications of the candidates. (Paras 123 and 122)

The Election Commission has to issue revised instructions to ensure implementation of Section 33-A subject to what is laid down in this judgment regarding the cases in which cognizance has been taken. The Election Commission's orders relating to disclosure of assets and liabilities will still hold good and continue to be operative. However, Direction 4 of para 14 insofar as verification of assets and liabilities by means of summary enquiry and rejection of nomination paper on the ground of furnishing wrong information or suppressing material information, should not be enforced. (Para 123)

Per Dharmadhikari, J. *(concurring)*

Making of law for election reform is undoubtedly a subject exclusively for the legislature. Based on the decision of the Supreme Court in the case of *Assn. for Democratic Reforms* and the directions made therein to the Election Commission, the Amendment Act under consideration has made an attempt to fill the void in law but the void has not been filled fully and does not satisfy the requirements for exercise of fundamental freedom of the citizen to participate in election as a well-informed voter. Democracy based on "free and fair elections" is considered as a basic feature of the Constitution. Lack of adequate legislative will to fill the vacuum in law for reforming the election process in accordance with the law declared by the Supreme Court in the case of *Assn. for Democratic Reforms* obligates the Supreme Court as an important organ in constitutional process to intervene. The Supreme Court is obliged by the Constitution to intervene because the legislative field, even after the passing of the Ordinance and the Amendment Act, leaves a vacuum. The Supreme Court in the case of *Assn. for Democratic Reforms* has determined the ambit of fundamental "right of information" to a voter. The law, as it stands today after amendment, is deficient in ensuring "free and fair elections". The Supreme Court has, therefore, found it necessary to strike down Section 33-B of the Amendment Act so as to revive the law declared by the Supreme Court in the case of *Assn. for Democratic Reforms*. (Paras 128 to 130)

Union of India v. *Assn. for Democratic Reforms*, (2002) 5 SCC 294, *referred to*

I agree with all the conclusions drawn by Shah, J. Though I agree with the conclusions of Reddi, J., I am unable to agree with his conclusions that the directives given in *Assn. for Democratic Reforms case* were pro tempore in nature and also that the failure to provide for disclosure of educational qualification does not, in practical terms, infringe the freedom of expression. (Paras 123, 131 and 132)

G. **Constitution of India — Art. 19(1)(a) — Freedom of information — Voters' right to know antecedents/assets of candidates contesting election to Parliament or Legislative Assembly — Held, per curiam, is a facet of Art. 19(1)(a) — Basis of such right, explained — Per Reddi, J., this right is different from right to information about public affairs or right to receive information through press or electronic media**

Per Shah, J.

All citizens of this country have the fundamental right to "freedom of speech and expression" and this phrase is construed to include fundamental right to know relevant antecedents of the candidate contesting the elections. Democratic republic is part of the basic structure of the Constitution. For this, free and fair periodical elections based on adult franchise are a must. For having unpolluted healthy democracy, citizen-voters should be well informed. The foundation of a healthy democracy is to have well-informed citizen-voters. The reason to have right of information with regard to the antecedents of the candidate is that the voter can judge and decide in whose favour he should cast his vote. It is the voter's discretion whether to vote in favour of an illiterate or literate candidate. It is his choice whether to elect a candidate against whom criminal cases for serious or non-serious charges were filed but is acquitted or discharged. He is to consider whether his candidate may or may not have sufficient assets so that he may not be tempted to indulge in unjustified means for accumulating wealth. For assets or liability, the voter may exercise his discretion in favour of a candidate whose liability is minimum and/or there are no overdues of public financial institution or government dues. From this information, it would be, to some extent, easy to verify whether unaccounted money is utilized for contesting election and whether a candidate is contesting election for getting rich or after being elected to what extent he became richer. Exposure to public scrutiny is one of the known means for getting clean and less polluted persons to govern the country. The little man — a citizen, a voter — is the master of his vote. He must have necessary information so that he can intelligently decide in favour of a candidate who satisfies his criterion of being elected as an MP or MLA. On occasions, it is stated that we are not having such intelligent voters. This is no excuse. This would be belittling the little citizen/voter. He himself may be illiterate but still he would have the guts to decide in whose favour he should cast his vote. In any case, for having free and fair election and not to convert democracy into a mobocracy and mockery or a farce, information to voters is a necessity. (Paras 16 to 18)

Right to participate by casting vote at the time of election would be meaningless unless the voters are well informed about all sides of the issues, in respect of which they are called upon to express their views by casting their votes. Disinformation, misinformation, non-information, all equally create an uninformed citizenry which would finally make democracy a mobocracy and a farce. The primary duty of the judiciary is to uphold the Constitution and the laws without fear or favour, without being biased by political ideology or economic theory. Interpretation should be in consonance with the constitutional provisions, which envisage a republic democracy. Survival of democracy depends upon free and fair election. It is true that the elections are fought by political parties, yet election would be a farce if the voters are unaware of the antecedents of candidates contesting elections. Their decision to vote either in favour of *A* or *B* candidate would be without any basis. Such election would be

neither free nor fair since for survival of true democracy the voter must be aware of the antecedents of his candidate. Voter has to cast intelligent and rational vote according to his own criteria. A well-informed voter is the foundation of democratic structure. That information to a voter, who is the citizen of this country, is one facet of the fundamental right under Article 19(1)(*a*).

(Paras 26, 9 and 27)

Kesavananda Bharati v. *State of Kerala*, (1973) 4 SCC 225; *State of U.P.* v. *Raj Narain*, (1975) 4 SCC 428; *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*, (1985) 1 SCC 641 : 1985 SCC (Tax) 121; *Romesh Thappar* v. *State of Madras*, AIR 1950 SC 124 : 1950 SCR 594 : 1950 Cri LJ 1514; *Secy., Ministry of Information and Broadcasting, Govt. of India* v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161; *S.P. Gupta* v. *Union of India*, 1981 Supp SCC 87, *relied on*

Attorney General v. *Times Newspapers Ltd.*, (1973) 3 All ER 54 : 1974 AC 273 : (1973) 3 WLR 298 (HL), *cited*

Law Commission Report, 1999, paras 5.1, 6.3; *Report of the National Commission to Review the Working of the Constitution*, 2002, paras 4.4, 4.12, 4.14, 4.23; *Ethics Manual for Members, Officers and Employees of the U.S. House of Representatives*; *Report of the Committee on State Funding of Elections* (headed by Shri Indrajit Gupta), 1998, *relied on*

Per Reddi, J. *(concurring)*

Freedom of speech and expression, just as equality clause and the guarantee of life and liberty has been very broadly construed by the Supreme Court right from the 1950s. It has been variously described as a "basic human right", "a natural right" and the like. It embraces within its scope the freedom of propagation and interchange of ideas, dissemination of information which would help formation of one's opinion and viewpoint and debates on matters of public concern. The importance which our Constitution-makers wanted to attach to this freedom is evident from the fact that reasonable restrictions on that right could be placed by law only on the limited grounds specified in Article 19(2), not to speak of inherent limitations of the right. In due course of time, several species of rights unenumerated in Article 19(1)(*a*) have branched off from the genus of the article through the process of interpretation by the Apex Court. One such right is the "right to information". The right of the citizens to obtain information on matters relating to public acts flows from the fundamental right enshrined in Article 19(1)(*a*). Securing information on the basic details concerning the candidates contesting for elections to Parliament or the State Legislature promotes freedom of expression and therefore the right to information forms an integral part of Article 19(1)(*a*). (Paras 82, 83, 86 and 123)

State of U.P. v. *Raj Narain*, (1975) 4 SCC 428; *S.P. Gupta* v. *Union of India*, 1981 Supp SCC 87; *Secy., Ministry of Information and Broadcasting, Govt. of India* v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161; *Dinesh Trivedi, MP* v. *Union of India*, (1997) 4 SCC 306, *relied on*

The citizens of the country are enabled to take part in the government through their chosen representatives. In a parliamentary democracy like ours, the Government of the day is responsible to the people through their elected representatives. The elected representative acts or is supposed to act as a live link between the people and the Government. The peoples' representatives fill the role of law-makers and custodians of the Government. People look to them for ventilation and redressal of their grievances. They are the focal point of the will and authority of the people at large. The moment they put in papers for contesting the election, they are subjected to public gaze and public scrutiny. The character, strength and weakness of the candidate is widely debated. Nothing is

therefore more important for sustenance of democratic polity than the voter making an intelligent and rational choice of his or her representative. For this, the voter should be in a position to effectively formulate his/her opinion and to ultimately express that opinion through ballot by casting the vote. The concomitant of the right to vote which is the basic postulate of democracy is thus twofold: first, formulation of opinion about the candidates and second, the expression of choice by casting the vote in favour of the preferred candidate at the polling booth. The first step is complementary to the other. Many a voter will be handicapped in formulating the opinion and making a proper choice of the candidate unless the essential information regarding the candidate is available. The voter/citizen should have at least the basic information about the contesting candidate, such as his involvement in serious criminal offences. To scuttle the flow of information — relevant and essential — would affect the electorate's ability to evaluate the candidate. Not only that, the information relating to the candidates will pave the way for public debate on the merits and demerits of the candidates. When once there is public disclosure of the relevant details concerning the candidates, the press, as a media of mass communication and voluntary organizations vigilant enough to channel the public opinion on right lines will be able to disseminate the information and thereby enlighten and alert the public at large regarding the adverse antecedents of a candidate. It will go a long way in promoting the freedom of speech and expression. That goal would be accomplished in two ways. It will help the voter who is interested in seeking and receiving information about the candidate to form an opinion according to his or her conscience and best of judgment and secondly, it will facilitate the press and voluntary organizations in imparting information on a matter of vital public concern. An informed voter — whether he acquires information directly by keeping track of disclosures or through the press and other channels of communication — will be able to fulfil his responsibility in a more satisfactory manner. An enlightened and informed citizenry would undoubtedly enhance democratic values. Thus, the availability of proper and relevant information about the candidate fosters and promotes the freedom of speech and expression both from the point of view of imparting and receiving the information. In turn, it would lead to the preservation of the integrity of electoral process which is so essential for the growth of democracy. Such information will certainly be conducive to fairness in election process and integrity in public life. The disclosure of information would facilitate and augment the freedom of expression both from the point of view of the voter as well as the media through which the information is publicized and openly debated. (Para 94)

Lily Thomas v. *Speaker, Lok Sabha*, (1993) 4 SCC 234, *relied on*

A voter "speaks out or expresses by casting vote". Freedom of expression, as contemplated by Article 19(1)(*a*) which in many respects overlaps and coincides with freedom of speech, has manifold meanings. It need not and ought not to be confined to expressing something in words orally or in writing. The act of manifesting by action or language is one of the meanings. Even a manifestation of an emotion, feeling etc. without words would amount to expression. Communication of emotion and display of talent through music, painting etc. is also a sort of expression. Having regard to the comprehensive meaning of the phrase "expression", voting can be legitimately regarded as a form of expression. Ballot is the instrument by which the voter expresses his choice between candidates or in respect to propositions; and his "vote" is his choice or election,

as expressed by his ballot. "Opinion expressed, resolution or decision carried, by voting" is one of the meanings given to the expression "vote". The fundamental right of freedom of speech and expression should be broadly construed and it has been so construed all these years. In the light of this, the dictum of the Court that the voter "speaks out or expresses by casting a vote" is apt and well founded. Freedom of voting by expressing preference for a candidate is nothing but freedom of expressing oneself in relation to a matter of prime concern to the country and the voter himself. (Para 95)

Ramanatha Aiyar's Law Lexicon; *Collin's Dictionary of English Language* (1983 Reprint); *A Dictionary of Modern Legal Usage*, 2nd Edn., by A. Garner Bryan; *New Oxford Illustrated Dictionary*, *relied on*

For the first time in *Assn. for Democratic Reforms case* which is the forerunner to the present controversy, the right to know about the candidate standing for election has been brought within the sweep of Article 19(1)(*a*). By doing so, a new dimension has been given to the right embodied in Article 19(1)(*a*) through a creative approach dictated by the need to improve and refine the political process of election. In carving out this right, the Court had not traversed a beaten track but took a fresh path. The right to information evolved by the Supreme Court in the said case is qualitatively different from the right to get information about public affairs or the right to receive information through the press and electronic media, though to a certain extent, there may be overlapping. The right to information of the voter/citizen is sought to be enforced against an individual who intends to become a public figure and the information relates to his personal matters. Secondly, that right cannot materialize without the State's intervention. The State or its instrumentality has to compel a subject to make the information available to the public, by means of legislation or orders having the force of law. It does not stand on the same footing as right to telecast and the right to view sports and games or other items of entertainment through television. (Para 92)

Till a candidate gets elected and enters the House, it would not be appropriate to refer to him as a public functionary. Therefore, the right to know about a public act done by a public functionary is not the same thing as the right to know about the antecedents of the candidate contesting for election. Nevertheless, the conclusion reached by the Court that the voter has such a right and that the right falls within the realm of freedom of speech and expression guaranteed by Article 19(1)(*a*) can be justified on good and substantial grounds. (Para 92)

State of U.P. v. *Raj Narain*, (1975) 4 SCC 428, *relied on*

Per Dharmadhikari, J. *(concurring)*

To control the ill-effects of money power and muscle power the Commissions recommend that election system should be overhauled and drastically changed lest democracy would become a teasing illusion to common citizens of this country. Not only a half-hearted attempt in the direction of reform of the election system is to be taken, as has been done by the present legislation by amending some provisions of the Act here and there, but a much improved election system is required to be evolved to make the election process both transparent and accountable so that influence of tainted money and physical force of criminals do not make democracy a farce — the citizen's fundamental "right to information" should be recognised and fully effectuated. (Para 127)

H. **Constitution of India — Art. 19(1)(a) — Right to vote and contest in elections to Parliament or Legislative Assembly — Held, per Shah, J., it is a statutory right — But it does not affect or abridge voter's right to know antecedents of candidates contesting the election which forms part of Art. 19(1)(a) and is an independent right — Therefore S. 33-B, RPA which abridges this right is unconstitutional — Per Reddi, J., right to vote is a constitutional right and not merely a statutory right — Freedom of voting, as distinct from right to vote, is a facet of Art. 19(1)(a) and it is accomplished by casting the vote — Election — Representation of the People Act, 1951 — S. 33-B (as inserted in 2002) — Constitutionality of**

It was submitted that right to elect or to be elected is a pure and simple statutory right and in the absence of statutory provision neither has the citizen a right to elect nor has he a right to be elected because such right is neither a fundamental right nor a common law right. It is, therefore, submitted that it cannot be held that a voter has any fundamental right of knowing the antecedents/assets of a candidate contesting the election. It was also submitted that on the basis of the decision rendered by the Supreme Court, the Act is amended by the impugned Ordinance/Amendment Act. However, for the directions which are left out, the presumption would be — it is a deliberate omission on the part of the legislature and, therefore, there is no question of it being violative of Article 19(1)(*a*).

Held :

Per Shah, J.

The right to vote or stand as a candidate for election and decision with regard to violation of election law is not a civil right but is a creature of statute or special law and would be subject to the limitations envisaged therein. (Para 57)

In an election petition challenging the validity of election, rights of the parties are governed by the statutory provisions for setting aside the election but this would not mean that a citizen who has right to be a voter and elect his representative in the Lok Sabha or Legislative Assembly has no fundamental right. Such a voter who is otherwise eligible to cast vote to elect his representative has statutory right under the Act to be a voter and has also a fundamental right as enshrined in Chapter III. Merely because a citizen is a voter or has a right to elect his representative as per the Act, his fundamental rights could not be abridged, controlled or restricted by statutory provisions except as permissible under the Constitution. If any statutory provision abridges the fundamental right, that statutory provision would be void. It also requires to be well understood that democracy based on adult franchise is part of the basic structure of the Constitution. The right of an adult to take part in election process either as a voter or a candidate could be restricted by a valid law which does not offend constitutional provisions. It cannot be held that as there is deliberate omission in law, the right of the voter to know the antecedents of the candidates, which is his fundamental right under Article 19(1)(*a*), is taken away. (Para 62)

C. Narayanaswamy v. *C.K. Jaffer Sharief*, 1994 Supp (3) SCC 170; *N.P. Ponnuswami* v. *Returning Officer*, AIR 1952 SC 64 : 1952 SCR 218; *G. Narayanaswami* v. *G. Pannerselvam*, (1972) 3 SCC 717; *Jyoti Basu* v. *Debi Ghosal*, (1982) 1 SCC 691 : (1982) 3 SCR 318, *distinguished*

The contention that as there is no specific fundamental right conferred on a voter by any statutory provision to know the antecedents of a candidate, the directions given by the Supreme Court are against the statutory provisions is, on

the face of it, without any substance. In an election petition challenging the validity of an election of a particular candidate, the statutory provisions would govern respective rights of the parties. However, voters' fundamental right to know the antecedents of a candidate is independent of statutory rights under the election law. A voter is first citizen of this country and apart from statutory rights, he is having fundamental rights conferred by the Constitution. Members of a democratic society should be sufficiently informed so that they may cast their votes intelligently in favour of persons who are to govern them. Right to vote would be meaningless unless the citizens are well informed about the antecedents of a candidate. There can be little doubt that exposure to public gaze and scrutiny is one of the surest means to cleanse our democratic governing system and to have competent legislatures. (Para 78)

The freedom of speech and expression is basic to and indivisible from a democratic polity. It includes right to impart and receive information. Restriction to the said right could be only as provided in Article 19(2). Right of a voter to know the biodata of a candidate is the foundation of democracy. The old dictum — let the people have the truth and the freedom to discuss it and all will go well with the Government — should prevail. The true test for deciding the validity of the Act is — whether it takes away or abridges fundamental rights of the citizens. If there is direct abridgment of the fundamental right of freedom of speech and expression, the law would be invalid. If the provisions of the law violate the constitutional provisions, they have to be struck down and that is what is required to be done in the present case. It is made clear that no provision is nullified on the ground that the Court does not approve the underlying policy of the enactment. (Paras 69 to 71 and 66)

The contention that Members of Parliament or the Legislature are representatives of the people and are supposed to know and be aware of what is good and bad for the people and that the Court cannot sit in judgment over their wisdom cannot be accepted. (Para 63)

P. Nalla Thampy Terah (Dr) v. *Union of India*, 1985 Supp SCC 189, *distinguished*

Per Reddi, J.

The right to vote for the candidate of one's choice is of the essence of democratic polity. This right is recognized by our Constitution and it is given effect to in specific form by the Representation of the People Act. The right to vote, if not a fundamental right, is certainly a constitutional right. The right originates from the Constitution and in accordance with the constitutional mandate contained in Article 326, the right has been shaped by the statute, namely the RP Act. That is the correct legal position as regards the nature of the right to vote in elections to the House of the People and Legislative Assemblies. It is not very accurate to describe it as a statutory right, pure and simple.
(Paras 96 and 97)

Lily Thomas v. *Speaker, Lok Sabha*, (1993) 4 SCC 234, *doubted*

A distinction has to be drawn between the conferment of the right to vote on fulfilment of requisite criteria and the culmination of that right in the final act of expressing choice towards a particular candidate by means of ballot. Though the initial right cannot be placed on the pedestal of a fundamental right, but, at the stage when the voter goes to the polling booth and casts his vote, his freedom to express arises. The casting of vote in favour of one or the other candidate tantamounts to expression of his opinion and preference and that final stage in the exercise of voting right marks the accomplishment of freedom of expression

of the voter. That is where Article 19(1)(*a*) is attracted. Freedom of voting as distinct from right to vote is thus a species of freedom of expression and therefore carries with it the auxiliary and complementary rights such as right to secure information about the candidate which are conducive to the freedom. (Para 97)

Jamuna Prasad Mukhariya v. *Lachhi Ram*, AIR 1954 SC 686 : (1955) 1 SCR 608, *distinguished*

The contention that if the right to information is culled out from Article 19(1)(*a*) and read as an integral part of that right, it is fraught with dangerous consequences inasmuch as the grounds of reasonable restrictions which could be imposed are by far limited and therefore, the Government may be constrained to part with certain sensitive informations which would not be in public interest to disclose, raises the larger question whether apart from the heads of restriction envisaged by sub-article (2) of Article 19, certain inherent limitations should not be read into the article, if it becomes necessary to do so in national or societal interest. Whenever rare situations of the kind anticipated by the counsel arise, the Constitution and the courts are not helpless in checking the misuse and abuse of the freedom. Such a check need not necessarily be found strictly within the confines of Article 19(2). (Paras 99 and 101)

Gitlow v. *New York*, 69 L Ed 1138 : 268 US 652 (1925), *relied on*

Per Dharmadhikari, J.

This freedom of a citizen to participate and choose a candidate at an election is distinct from exercise of his right as a voter which is to be regulated by statutory law on the election like the RP Act. (Para 127)

I. **Constitution of India — Art. 145(3) — Question regarding interpretation of Art. 19(1)(a) finally decided by Supreme Court in *Union of India* v. *Assn. for Democratic Reforms*, (2002) 5 SCC 294 by taking the view that right of voters to know antecedents/assets of candidates contesting election is part of Art. 19(1)(a) — No other substantial question of law requiring interpretation of the Constitution surviving — Held, matter not required to be referred to a five-Judge Bench of the Supreme Court**

Per Shah, J. *(Dharmadhikari, J. concurring)*

The submission that the question involved in these petitions is a substantial question of law as to the interpretation of the Constitution and, therefore, the matter may be referred to a Bench consisting of five Judges is totally misconceived. No such contention was raised before the Supreme Court in *Assn. for Democratic Reforms case* in which it arrived at the conclusion that for survival of the democracy, right of the voter to know antecedents of a candidate would be part and parcel of his fundamental right. It would be the basis for free and fair election which is a basic structure of the Constitution. Therefore, the question relating to interpretation of Article 19(1)(*a*) is concluded and there is no other question which requires interpretation of the Constitution. The question raised before the present Bench has been finally decided and no other substantial question of law regarding the interpretation of the Constitution survives. Hence, the matter is not required to be referred to a five-Judge Bench. [Paras 28, 32 and 78(c)]

Union of India v. *Assn. for Democratic Reforms*, (2002) 5 SCC 294, *referred to*

State of J&K v. *Thakur Ganga Singh*, AIR 1960 SC 356 : (1960) 2 SCR 346; *Sardar Sardul Singh Caveeshar* v. *State of Maharashtra* sub nom *Bhagwan Swarup Lal Bishan Lal* v. *State of Maharashtra*, AIR 1965 SC 682 : (1964) 2 SCR 378 : (1965) 1 Cri LJ 608, *relied on*

Per Reddi, J. *(concurring)*

It would have been in the fitness of things if the case (*UOI* v. *Assn. for Democratic Reforms*) was referred to the Constitution Bench as per the mandate of Article 145(3) for the reason that a new dimension has been added to the concept of freedom of expression so as to bring within its ambit a new species of right to information. Apparently, no such request was made at the hearing and all parties invited the decision of the three-Judge Bench. The law has been laid down therein elevating the right to secure information about a contesting candidate to the position of a fundamental right. That decision has been duly taken note of by Parliament and acted upon by the Election Commission. It has attained finality. No decision of the Supreme Court goes counter to the accepted proposition that the fundamental right of freedom of expression sets in when a voter actually casts his vote. At this stage, it would not be appropriate to set the clock back and refer the matter to the Constitution Bench to test the correctness of the view taken in that case. (Paras 92 and 97)

Union of India v. *Assn. for Democratic Reforms*, (2002) 5 SCC 294, *referred to*

J. **Constitution of India — Art. 19(1)(a) — Voters' right to know antecedents/assets of candidates contesting election — Directions given to Election Commission by Supreme Court in *Union of India* v. *Assn. for Democratic Reforms*, (2002) 5 SCC 294 requiring the candidates to disclose certain information relating to their antecedents/assets — Pursuant thereto, Election Commission issuing direction to reject nomination paper on furnishing wrong or incomplete information or suppression of material information by any candidate and to hold a summary enquiry at the time of scrutiny of nomination — Held, such direction unjustified**

Held :

Per Shah, J.

While no exception can be taken to the insistence of affidavit with regard to the matters specified in the judgment in *Assn. for Democratic Reforms case* the direction to reject the nomination paper for furnishing wrong information or concealing material information and providing for a summary enquiry at the time of scrutiny of the nominations, cannot be justified. In the case of assets and liabilities, it would be very difficult for the Returning Officer to consider the truth or otherwise of the details furnished with reference to the "documentary proof". Very often, in such matters the documentary proof may not be clinching and the candidate concerned may be handicapped to rebut the allegation then and there. If sufficient time is provided, he may be able to produce proof to contradict the objector's version. It is true that the aforesaid directions issued by the Election Commission are not under challenge but at the same time *prima facie* it appears that the Election Commission is required to revise its instructions in the light of directions issued in *Assn. for Democratic Reforms case* and as provided under the Representation of the People Act and its Third Amendment. (Para 73)

K. **Constitution of India — Art. 32 — Notice — Vires of an Act challenged — Union of India made party-respondent and Solicitor-General appearing on its behalf before the Court — Held, per Shah, J., service of notice to Attorney-General would only be an empty formality (Para 75)**

L. **Constitution of India — Arts. 32, 136 & 226 — Political question — Court should not shirk from its duty of performing its function merely because it has political thicket** **[Para 9(c)]**

State of Rajasthan v. *Union of India*, (1977) 3 SCC 592; *B.R. Kapur* v. *State of T.N.*, (2001) 7 SCC 231, *relied on*

R-M/TZ/27923/C

Advocates who appeared in this case :

K.N. Raval, Additional Solicitor-General, Rajinder Sachar, P.P. Rao and Ranjit Kumar, Senior Advocates (Sanjay Parikh, A.N. Singh, R. Chandrachud, Ms Vandana Sudan, Abinash K. Misra, Prashant Bhushan, Sanjeev K. Kapoor, T.K. Naveen, Vishal Gupta, Anil Kr. Mittal, G. Balaji, Ms Kamini Jaiswal, Ms Bina Gupta, Ms Divya Roy, Prateek Jalan, Preetesh Kapur, S.N. Terdal and S. Muralidhar, Advocates, with them) for the appearing parties.

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The Judgments of the Court were delivered by

SHAH, J.— These writ petitions under Article 32 of the Constitution of India have been filed challenging the validity of the Representation of the People (Amendment) Ordinance, 2002 (4 of 2002) ("the Ordinance" for short) promulgated by the President of India on 24-8-2002†.

2. There was an era when a powerful or a rich or a strong or a dacoit aged more than 60 years married a beautiful young girl despite her resistance. Except to weep, she had no choice of selecting her mate. To a large extent, such situation does not prevail today. Now, young persons are selecting mates of their choice after verifying full details thereof. Should we not have such a situation in selecting a candidate contesting elections? In a vibrant democracy — is it not required that a little voter should know the biodata of his/her would-be rulers, law-makers or destiny-makers of the nation?

3. Is there any necessity of keeping in the dark the voters that their candidate was involved in criminal cases of murder, dacoity or rape *or* has acquired the wealth by unjustified means? Maybe, that he is acquitted because the investigating officer failed to unearth the truth or because the witnesses turned hostile. In some cases, apprehending danger to their life, witnesses fail to reveal what was seen by them.

4. Is there any necessity of permitting candidates or their supporters to use unaccounted money during elections? If assets are declared, would it not amount to having some control on unaccounted election expenditure?

5. It is equally true that right step in that direction is taken by amending the Representation of the People Act, 1951 (hereinafter referred to as "the Act") on the basis of judgment rendered by this Court in *Union of India* v. *Assn. for Democratic Reforms*[1]. Still however, question to be decided is — whether it is in accordance with what has been declared in the said judgment.

6. After concluding hearing of the arguments on 23-10-2002, the matter was reserved for pronouncement of judgment. Before the judgment could be pronounced, the Ordinance was repealed and on 28-12-2002, the Representation of the People (Third Amendment) Act, 2002†† ("the Amended Act" for short) was notified to come into force with retrospective effect. Thereafter, an amendment application was moved before us challenging the validity of Section 33-B of the Amendment Act which was granted because there is no change in the cause of action nor in the wording of Section 33-B of the Amended Act, validity of which is under challenge. At the request of learned counsel for the respondent Union of India, time to file additional counter was granted and the matter was further heard on 31-1-2003.

† **Ed.**: For text of this Ordinance see 2003 Current Central Legislation, Part II, at p. 3

1 (2002) 5 SCC 294 [**Ed.**: Coram : M.B. Shah, B.P. Singh and H.K. Sema, JJ.]

†† **Ed.**: For text of this Act see 2003 Current Central Legislation, Part II, at p. 131

7. It is apparent that there is no change in the wording (even fullstop or comma) of Sections 33-A and 33-B of the Ordinance and Sections 33-A and 33-B of the Amended Act. The said sections read as under:

"33-A. *Right to information.*—(1) A candidate shall, apart from any information which he is required to furnish, under this Act or the rules made thereunder, in his nomination paper delivered under sub-section (1) of Section 33, also furnish the information as to whether—

(*i*) he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the court of competent jurisdiction;

(*ii*) he has been convicted of an offence other than any offence referred to in sub-section (1) or sub-section (2), or covered in sub-section (3), of Section 8 and sentenced to imprisonment for one year or more.

(2) The candidate or his proposer, as the case may be, shall, at the time of delivering to the Returning Officer the nomination paper under sub-section (1) of Section 33, also deliver to him an affidavit sworn by the candidate in a prescribed form verifying the information specified in sub-section (1).

(3) The Returning Officer shall, as soon as may be after the furnishing of information to him under sub-section (1), display the aforesaid information by affixing a copy of the affidavit, delivered under sub-section (2), at a conspicuous place at his office for the information of the electors relating to a constituency for which the nomination paper is delivered.

33-B. *Candidate to furnish information only under the Act and the rules.*—Notwithstanding anything contained in any judgment, decree or order of any court or any direction, order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under this Act or the rules made thereunder."

8. For the directions, which were issued in *Assn. for Democratic Reforms*[1] it is contended that some of them are incorporated by the statutory provisions but with regard to the remaining directions it has been provided therein that no candidate shall be liable to disclose or furnish any such information in respect of his election which is not required to be disclosed or furnished under the Act or the rules made thereunder, despite the directions issued by this Court. Therefore, the aforesaid Section 33-B is under challenge.

9. At the outset, we would state that such exercise of power by the legislature giving similar directions was undertaken in the past and this Court in unequivocal words declared that the legislature in this country has no power to ask the instrumentalities of the State to disobey or disregard the decisions given by the courts. For this, we would quote some observations on the settled legal position having direct bearing on the question involved in these matters:

(*A*) Dealing with the validity of the Bombay Provincial Municipal Corporation (Gujarat Amendment and Validating Provisions) Ordinance,

1969, this Court in *Municipal Corpn. of the City of Ahmedabad* v. *New Shrock Spg. and Wvg. Co. Ltd.*[2] observed thus: (SCC p. 285, para 7)

> "*7. This is a strange provision.* Prima facie that provision appears to command the Corporation to refuse to refund the amount illegally collected despite the orders of this Court and the High Court. The State of Gujarat was not well advised in introducing this provision. That provision attempts to make a direct inroad into the judicial powers of the State. The Legislatures under our Constitution have within the prescribed limits, powers to make laws prospectively as well as retrospectively. *By exercise of those powers, the Legislature can remove the basis of a decision rendered by a competent court thereby rendering that decision ineffective. But no Legislature in this country has power to ask the instrumentalities of the State to disobey or disregard the decisions given by courts.*" (emphasis supplied)

Further, Khanna, J. in *Indira Nehru Gandhi* v. *Raj Narain*[3] succinctly and without any ambiguity observed thus: (SCC p. 84, para 190)

> "*190.* A declaration that an order made by a court of *law is void is normally part of the judicial function and is not a legislative function.* Although there is in the Constitution of India no rigid separation of powers, by and large the spheres of judicial function and *legislative function have been demarcated and it is not permissible for the Legislature to encroach upon the judicial sphere. It has accordingly been held that a Legislature while it is entitled to change with retrospective effect the law which formed the basis of the judicial decision, it is not permissible to the Legislature to declare the judgment of the court to be void or not binding....*" (emphasis supplied)

It is also settled law that the legislature may remove the defect which is the cause for invalidating the law by the Court by appropriate legislation if it has power over the subject-matter and competence to do so under the Constitution.

(*B*) Secondly, we would reiterate that the primary duty of the judiciary is to uphold the Constitution and the laws without fear or favour, without being biased by political ideology or economic theory. Interpretation should be in consonance with the constitutional provisions, which envisage a republic democracy. Survival of democracy depends upon free and fair election. It is true that the elections are fought by political parties, yet election would be a farce if the voters are unaware of the antecedents of candidates contesting elections. Their decision to vote either in favour of *A* or *B* candidate would be without any basis. Such election would be neither free nor fair.

2 (1970) 2 SCC 280
3 1975 Supp SCC 1

For this purpose, we would refer to the observations made by Khanna, J. in *Kesavananda Bharati* v. *State of Kerala*[4] which read thus: (SCC p. 821, para 1535)

> "That all constitutional interpretations have political consequences should not obliterate the fact that the decision has to be arrived at in the calm and dispassionate atmosphere of the courtroom, that Judges in order to give legitimacy to their decision have to keep aloof from the din and controversy of politics and that the fluctuating fortunes of rival political parties can have for them only academic interest. *Their primary duty is to uphold the Constitution and the laws without fear or favour and in doing so, they cannot allow any political ideology or economic theory, which may have caught their fancy, to colour the decision.*" (emphasis supplied)

(*C*) It is also equally settled law that the court should not shirk its duty of performing its function merely because it has political thicket. Following observations (of Bhagwati, J., as he then was) made in *State of Rajasthan* v. *Union of India*[5] (at SCC pp. 660-61, para 149) were referred to and relied upon by this Court in *B.R. Kapur* v. *State of T.N.*[6]: (SCC p. 302, para 53)

> "*53.* ... 'But merely because the question has a political complexion, that by itself is no ground why the court should shrink from performing its duty under the Constitution if it raises an issue of constitutional determination. Every constitutional question concerns the allocation and exercise of governmental power and no constitutional question can, therefore, fail to be political. ... *So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the court. Indeed it would be its constitutional obligation to do so.* It is necessary to assert in the clearest possible terms, particularly in the context of recent history, that the Constitution is *suprema lex*, the paramount law of the land, and there is no department or branch of Government above or beyond it.' " (emphasis supplied)

Submissions

10. It is contended by learned Senior Counsel Mr Rajinder Sachar and Mr P.P. Rao for the petitioners that Section 33-B is, on the face of it, arbitrary and unjustifiable. It is their contention that the aforesaid section is on the face of it void as a law cannot be passed which violates/abridges the fundamental rights of the citizens/voters, declared and recognised by this Court. It is submitted that without exercise of the right to know the relevant antecedents of the candidate, it will not be possible to have free and fair elections. Therefore, the impugned section violates the very basic features of the

4 (1973) 4 SCC 225
5 (1977) 3 SCC 592
6 (2001) 7 SCC 231

Constitution, namely, republic democracy. For having free and fair elections, anywhere in the territory of this country, it is necessary to give effect to the voters' fundamental right as declared by this Court in the above judgment.

11. It has been contended that, in our country, at present about 700 legislators and twenty-five to thirty Members of Parliament are having criminal record. It is also contended that almost all political parties declare that persons having criminal record should not be given tickets, yet for one or the other reason, political parties under some compulsion give tickets to some persons having criminal records and some persons having no criminal records get support from criminals. It is contended by learned Senior Counsel Mr Sachar that by issuing the Ordinance, the Government has arrogated to itself the power to decide unilaterally for nullifying the decision rendered by this Court without considering whether it can pass legislation which abridges fundamental right guaranteed under Article 19(1)(*a*). It is his submission that the Ordinance is issued and thereafter the Act is amended because it appears that the Government is interested in having uninformed ignorant voters.

12. Contra, learned Solicitor-General Mr Kirit N. Raval and learned Senior Counsel Mr Arun Jaitley appearing on behalf of the intervener, with vehemence, submitted that the aforesaid Ordinance/Amended Act is in consonance with the judgment rendered by this Court and the vacuum pointed out by the said judgment is filled in by the enactment. It is also contended by learned Senior Counsel Mr Jaitley that voters' right to know the antecedents of the candidate is not part of the fundamental rights, but it is a derivative fundamental right on the basis of interpretation of Article 19(1)(*a*) given by this Court. It is submitted that the Ordinance/Amended Act is in public interest and, therefore, it cannot be held to be illegal or void. In support of their contentions, learned counsel for the parties have referred to various decisions rendered by this Court.

Whether Ordinance/Amended Act covers the directions issued by this Court

13. Before dealing with the rival submissions, we would refer to the following directions (SCC p. 322, para 48) given by this Court in *Assn. for Democratic Reforms case*[1]:

> "*48.* The Election Commission is directed to call for information on affidavit by issuing necessary order in exercise of its power under Article 324 of the Constitution of India from each candidate seeking election to Parliament or a State Legislature as a necessary part of his nomination paper, furnishing therein, information on the following aspects in relation to his/her candidature:
>
> (*1*) Whether the candidate is convicted/acquitted/discharged of any criminal offence in the past — if any, whether he is punished with imprisonment or fine.
>
> (*2*) Prior to six months of filing of nomination, whether the candidate is accused in any pending case, of any offence punishable with imprisonment for two years or more, and in which charge is

framed or cognizance is taken by the court of law. If so, the details thereof.

(*3*) The assets (immovable, movable, bank balance etc.) of a candidate and of his/her spouse and that of dependants.

(*4*) Liabilities, if any, particularly whether there are any overdues of any public financial institution or government dues.

(*5*) The educational qualifications of the candidate."

14. The learned counsel for the respondent submitted that the directions issued by this Court are, to a large extent, implemented by the aforesaid Amended Act. It is true that some part of the directions issued by this Court are implemented. Comparative chart on the basis of judgment and Ordinance would make the position clear:

Subject	***Discussion in judgment dated 2-5-2002***	***Provisions under the impugned Ordinance/Amended Act***
Past criminal record	*Para 48(1)* All past convictions/ acquittals/discharges, whether punished with imprisonment or fine.	*Section 33-A(1)(ii)* Conviction of any offence (except Section 8 offence) and sentenced to imprisonment of one year or more. No such declaration in case of acquittals or discharge. (Section 8 offences to be disclosed in nomination paper itself)
Pending criminal cases	*Para 48(2)* Prior to six months of filing of nomination, whether the candidate has been accused of any criminal offence punishable with imprisonment of two years or more, and charge framed or cognizance taken.	*Section 33-A(1)(i)* Any case in which the candidate has been accused of any criminal offence punishable with imprisonment of two years or more, and charge framed.
Assets and liabilities	*Para 48(3)* Assets of candidate (contesting the elections), spouse and dependants.	*Section 75-A* *No such declaration by a candidate who is contesting election.* After election, elected candidate is required to furnish information relating to him as well as his spouse and dependent children's assets to the Speaker of the House of the People.

	Para 48(4)	
	Liabilities, particularly to Government and public financial institutions.	No provision is made for the candidate contesting election. However, after election, Sections 75-A(1)(*ii*) and (*iii*) provide for elected candidate.
Educational qualifications	*Para 48(5)* To be declared	No provision.
Breach of provisions	No direction regarding consequences of non-compliance.	*Section 125-A* Creates an offence punishable by imprisonment for six months or fine for failure to furnish affidavit in accordance with Section 33-A, as well as for falsity or concealment in affidavit or nomination paper. *Section 75-A(5)* Wilful contravention of rules regarding asset disclosure may be treated as breach of privilege of the House.

15. From the aforesaid chart, it is clear that a candidate is not required to disclose (*a*) the cases in which he is acquitted or discharged of criminal offence(s); (*b*) his assets and liabilities; and (*c*) his educational qualification. With regard to assets, it is sought to be contended that under the Act the candidate would be required to disclose the same to the Speaker after being elected. It is also contended that once the person is acquitted or discharged of any criminal offence, there is no necessity of disclosing the same to the voters.

Finality of the judgment

16. Firstly, it is to be made clear that the judgment rendered by this Court in *Assn. for Democratic Reforms*[1] has attained finality. The voters' right to know the antecedents of the candidates is based on interpretation of Article 19(1)(*a*) which provides that all citizens of this country would have fundamental right to "freedom of speech and expression" and this phrase is construed to include fundamental right to know relevant antecedents of the candidate contesting the elections.

17. Further, even though we are not required to justify the directions issued in the aforesaid judgment, to make it abundantly clear that it is not *ipse dixit* and is based on sound foundation, it can be stated thus:

— Democratic republic is part of the basic structure of the Constitution.

— For this, free and fair periodical elections based on adult franchise are a must.

— For having unpolluted healthy democracy, citizens-voters should be well informed.

18. So, the foundation of a healthy democracy is to have well-informed citizens-voters. The reason to have right of information with regard to the antecedents of the candidate is that voter can judge and decide in whose favour he should cast his vote. It is the voter's discretion whether to vote in favour of an illiterate or literate candidate. It is his choice whether to elect a candidate against whom criminal cases for serious or non-serious charges were filed but is acquitted or discharged. He is to consider whether his candidate may or may not have sufficient assets so that he may not be tempted to indulge in unjustified means for accumulating wealth. For assets or liability, the voter may exercise his discretion in favour of a candidate whose liability is minimum and/or there are no overdues of public financial institution or government dues. From this information, it would be, to some extent, easy to verify whether unaccounted money is utilized for contesting election and whether a candidate is contesting election for getting rich or after being elected to what extent he became richer. Exposure to public scrutiny is one of the known means for getting clean and less polluted persons to govern the country. A little man — a citizen — a voter is the master of his vote. He must have necessary information so that he can intelligently decide in favour of a candidate who satisfies his criterion of being elected as an MP or MLA. On occasions, it is stated that we are not having such intelligent voters. This is no excuse. This would be belittling a little citizen/voter. He himself may be illiterate but still he would have the guts to decide in whose favour he should cast his vote. In any case, for having free and fair election and not to convert democracy into a mobocracy and mockery or a farce, information to voters is a necessity.

19. Further, in context of Section 8 of the Act, the Law Commission in its Report submitted in 1999 observed as under:

> "5.1. The Law Commission had proposed that in respect of offences provided in sub-section (1) [except the offence mentioned in clause (*b*) of sub-section (1)], a mere framing of charge should serve as a disqualification. This provision was sought to be made in addition to existing provision which provides for disqualification arising on account of conviction. *The reason for this proposal was that most of the offences mentioned in sub-section (1) are either election offences or serious offences affecting the society and that the persons committing these offences are mostly persons having political clout and influence.* Very often these elements are supported by unsocial persons or group of persons, with the result that no independent witness is prepared to come forward to depose against such persons. In such a situation, it is proving extremely difficult to obtain conviction of these persons. *It was suggested that inasmuch as charges were framed by a court* on the basis of the material placed before it by the *prosecution including the material disclosed by the charge-sheet, providing for disqualification on the ground of framing of the charge-sheet would be neither unjust nor unreasonable or arbitrary.*"

The Law Commission also observed:

"6.3.1. There has been mounting corruption in all walks of public life. *People are generally lured to enter politics or contest elections for getting rich overnight. Before allowing people to enter public life the public has a right to know the antecedents of such persons.* The existing conditions in which people can freely enter the political arena without demur, especially without the electorate knowing about any details of the assets possessed by the candidate are far from satisfactory. *It is essential by law to provide that a candidate seeking election shall furnish the details of all his assets (movable/immovable) possessed by him/her, wife/husband, dependent relations, duly supported by an affidavit.*

6.3.2. Further, in view of recommendations of the Law Commission for debarring a candidate from contesting an election if charges have been framed against him by a court in respect of offences mentioned in the proposed Section 8-B of the Act, it is also necessary for a candidate seeking to contest election to furnish details regarding criminal case, if any, pending against him, including a copy of the FIR/complaint and any order made by the court concerned.

6.3.3. In order to achieve the aforesaid objectives, it is essential to insert a new Section 4-A after the existing Section 4 of the Representation of the People Act, 1951, as follows:

'4-A. *Qualification for membership of the House of the People, the Council of States, Legislature Assembly of a State or Legislative Council.*—A person shall not be qualified to file his nomination for contesting any election for a seat in the House of the People, the Council of States, Legislature Assembly or Legislative Council of a State unless he or she files—

(*a*) a declaration of all his assets (movable/immovable) possessed by him/her, his/her spouse and dependent relations, duly supported by an affidavit, and

(*b*) a declaration as to whether any charge in respect of any offence referred to in Section 8-B has been framed against him by any criminal court.' "

20. It is to be stated that similar views are expressed in the Report submitted in March 2002 by the *National Commission to Review the Working of the Constitution* appointed by the Union Government for reviewing the working of the Constitution. Relevant recommendations are as under:

"*Successes and failures*

4.4. During the last half-a-century, there have been thirteen general elections to the Lok Sabha and a much large number to various State Legislative Assemblies. We can take legitimate pride in that these have been successful and generally acknowledged to be free and fair. *But, the experience has also brought to the fore many distortions, some very serious, generating a deep concern in many quarters. There are constant*

references to the unhealthy role of money power, muscle power and mafia power and to criminalisation, corruption, communalism and casteism.

4.12. *Criminalisation*

4.12.2. The Commission recommends that the Representation of the People Act be amended to provide that *any person charged with any offence punishable with imprisonment for a maximum term of five years or more, should be disqualified for being chosen as, or for being, a Member of Parliament or Legislature of a State on the expiry of a period of one year from the date the charges were framed against him by the court in that offence and unless cleared during that one year period*, he shall continue to remain so disqualified till the conclusion of the trial for that offence. In case a person is convicted of any offence by a court of law and sentenced to imprisonment for six months or more the bar should apply during the period under which the convicted person is undergoing the sentence and for a further period of six years after the completion of the period of the sentence. If any candidate violates this provision, he should be disqualified. Also, if a party puts up such a candidate with knowledge of his antecedents, it should be derecognised and deregistered.

4.12.3. Any person convicted for any heinous crime like murder, rape, smuggling, dacoity etc. should be permanently debarred from contesting for any political office.

4.12.8. The Commission feels that the proposed provision laying down that a person charged with an offence punishable with imprisonment which may extend to five years or more should be disqualified from contesting elections after the expiry of a period of one year from the date the charges were framed in a court of law should equally be applicable to sitting Members of Parliament and State Legislatures as to any other such person.

4.14. *High cost of elections and abuse of money power*

4.14.1. One of the most critical problems in the matter of electoral reforms is the hard reality that for contesting an election one needs large amounts of money. The limits of expenditure prescribed are meaningless and almost never adhered to. *As a result, it becomes difficult for the good and the honest to enter legislatures. It also creates a high degree of compulsion for corruption in the political arena.* This has progressively polluted the entire system. Corruption, because it erodes performance, becomes one of the leading reasons for non-performance and compromised governance in the country. *The sources of some of the election funds are believed to be unaccounted criminal money in return for protection, unaccounted funds from business groups who expect a high return on this investment, kickbacks or commissions on contracts etc.* No matter how we look at it, citizens are directly affected because apart from compromised governance, the huge money spent on elections pushes up the cost of everything in the country. It also leads to unbridled

corruption and the consequences of widespread corruption are even more serious than many imagine. Electoral compulsions for funds become the foundation of the whole superstructure of corruption.

4.14.3. Transparency in the context of election means both the sources of finance as well as their utilization as are listed out in an audited statement. If the candidates are required to list the sources of their income, this can be checked back by the Income Tax Authorities. *The Commission recommends that the political parties as well as individual candidates be made subject to a proper statutory audit of the amounts they spend. These accounts should be monitored through a system of checking and cross-checking through the income tax returns filed by the candidates, parties and their well-wishers. At the end of the election each candidate should submit an audited statement of expenses under specific heads.* EC should devise specific formats for filing such statements so that fudging of accounts becomes difficult. Also, the audit should not only be mandatory but it should be enforced by the Election Commission.

Any violation or misreporting should be dealt with strongly.

4.14.4. *The Commission recommends that every candidate at the time of election must declare his assets and liabilities along with those of his close relatives. Every holder of a political position must declare his assets and liabilities along with those of his close relations annually. Law should define the term 'close relatives'.*

4.14.6. *All candidates should be required under law to declare their assets and liabilities by an affidavit and the details so given by them should be made public.* Further, as a follow-up action, the particulars of the assets and liabilities so given should be audited by a special authority created specifically under law for the purpose. *Again, the legislators should be required under law to submit their returns about their liabilities every year and a final statement in this regard at the end of their term of office.*

Candidates owing government dues

4.23. *It is recommended that all candidates should be required to clear government dues before their candidatures are accepted.* This pertains to payment of taxes and bills and unauthorised occupation of accommodation and availing of telephones and other government facilities to which they are no longer entitled. The fact that matters regarding government dues in respect of the candidate are pending before a court of law should be no excuse."

21. Mr P.P. Rao, learned Senior Counsel has drawn our attention to the "*Ethics Manual for Members, Officers and Employees of the U.S. House of Representatives*", which *inter alia* provides as under:

"*Financial interests and investments of Members and employees, as well as those of candidates for the House of Representatives, may present*

conflicts of interest with official duties. Members and employees need not, however, divest themselves of assets upon assuming their positions, nor must Members disqualify themselves from voting on issues that generally affect their personal financial interests. Instead, public financial disclosure provides a means of monitoring and deterring conflicts.

All Members, officers, and employees are prohibited from improperly using their official positions for personal gain. Members, officers, candidates, and certain employees must file annual financial disclosure statements, summarizing financial information concerning themselves, their spouses, and dependent children. Such statements must indicate outside compensation, holdings and business transactions, generally for the calendar year preceding the filing date.

Who must file

The following individuals must file financial disclosure statements:

— Members of the House of Representatives;

— candidates for the House of Representatives;

When to file

Candidates who raise or spend more than $ 5000 for their campaigns must file within 30 days of doing so, or by May 15, whichever is later, but in any event at least 30 days prior to the elections in which they run.

Termination reports must be filed within 30 days of leaving government employment by Members, officers, and employees who file financial disclosure statements.

POLICIES UNDERLYING DISCLOSURE

Members, officers, and certain employees must annually disclose personal financial interests, including investments, income, and liabilities. *Financial disclosure provisions were enacted to monitor and to deter possible conflicts of interest due to outside financial holdings.* Proposals for divestiture of potentially conflicting assets and mandatory disqualification of Members from voting rejected as impractical or unreasonable. *Such disqualification could result in the disenfranchisement of a Member's entire constituency on particular issues.* A Member may often have a community of interests with his constituency, may arguably have been elected because of and to serve these common interests, and thus would be ineffective in representing the real interests of his constituents if he were disqualified from voting on issues touching those matters of mutual concern. In rare instances, the House rule on abstaining from voting may apply where a direct personal interest in a matter exists.

At the other extreme, a conflict of interest becomes corruption when an official uses his position of influence to enhance his personal financial interests. Between these extremes are those ambiguous circumstances which may create a real or potential conflict of interest. The problem is identifying those instances in which an official allows his personal

economic interests to impair his independence of judgment in the conduct of his public duties.

The House has required public financial disclosure by rule since 1968 and by statute since 1978.

SPECIFIC DISCLOSURE REQUIREMENTS

The Ethics in Government Act of 1978 mandated annual financial disclosure by all senior Federal personnel, including all Members and some employees of the House. The Ethics Reform Act of 1989 totally revamped these provisions and condensed what had been different requirements for each branch into one uniform title covering the entire Federal Government. Financial disclosure statements must indicate outside compensation, holdings, and business transactions, generally for the calendar year preceding the filing date. In all instances, filers may disclose additional information or explanation at their discretion."

22. At this stage, it would be worthwhile to note some observations made by the Committee on State Funding of Elections headed by Shri Indrajit Gupta as Chairman and others, which submitted its Report in 1998. In the concluding portion, it has mentioned as under:

"*Conclusion*

1. Before concluding, the Committee cannot help expressing its considered view that its recommendations being limited in nature and confined to only one of the aspects of the electoral reforms may bring about only some cosmetic changes in the electoral sphere. *What is needed, however, is an immediate overhauling of the electoral process whereby elections are freed from evil influence of all vitiating factors, particularly, criminalisation of politics. It goes without saying that money power and muscle power go together to vitiate the electoral process and it is their combined effect which is sullying the purity of electoral contests and affecting free and fair elections.* Meaningful electoral reforms in other spheres of electoral activity are also urgently needed if the present recommendations of the Committee are to serve the intended useful purpose."

23. From the aforesaid Reports of the Law Commission, National Commission to Review the Working of the Constitution, conclusion drawn in the Report of Shri Indrajit Gupta and the Ethics Manual applicable in an advance democratic country, it is apparent that for saving the democracy from the evil influence of criminalisation of politics, for saving the election from muscle and money power, for having true democracy and for controlling corruption in politics, the candidate contesting the election should be asked to disclose his antecedents including assets and liabilities. Thereafter, it is for the voters to decide in whose favour he should cast his vote.

24. Further, we would state that this Court has construed "freedom of speech and expression" in various decisions and on the basis of tests laid therein, directions were issued. In short, this aspect is discussed in paras 31, 32 and 33 of our earlier judgment which read as under: (SCC pp. 314-15)

"*31.* In *State of U.P.* v. *Raj Narain*[7] the Constitution Bench considered a question — whether privilege can be claimed by the Government of Uttar Pradesh under Section 123 of the Evidence Act in respect of what has been described for the sake of brevity to be the Blue Book summoned from the Government of Uttar Pradesh and certain documents summoned from the Superintendent of Police, Rae Bareli, Uttar Pradesh? The Court observed that: (SCC p. 453, para 74)

> 'The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security.'

The Court pertinently observed as under: (SCC p. 453, para 74)

> '*74.* In a Government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. *The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries.* They are entitled to know the particulars of every public transaction in all its bearing.'

32. In *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*[8] this Court dealt with the validity of customs duty on the newsprint in context of Article 19(1)(*a*). The Court observed (in para 32) thus: (SCC p. 664)

> 'The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments.'

33. The Court further referred (in SCC p. 665, para 35) the following observations made by this Court in *Romesh Thappar* v. *State of Madras*[9]: (SCR p. 602)

> '(The freedom) lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible. A freedom of such amplitude might involve risks of abuse. But ... "it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits".'

Again in SCC pp. 685-86, para 68, the Court observed:

> ' "*The public interest in freedom of discussion (of which the freedom of the press is one aspect) stems from the requirement that members of a democratic society should be sufficiently informed that they may influence intelligently the decisions which may affect themselves.*" (Per Lord Simon of Glaisdale in *Attorney General* v.

7 (1975) 4 SCC 428
8 (1985) 1 SCC 641 : 1985 SCC (Tax) 121
9 AIR 1950 SC 124 : 1950 SCR 594 : 1950 Cri LJ 1514

Times Newspapers Ltd.[10] Freedom of expression, as learned writers have observed, has four broad social purposes to serve: (*i*) it helps an individual to attain self-fulfilment, (*ii*) it assists in the discovery of truth, (*iii*) *it strengthens the capacity of an individual in participating in decision-making* and (*iv*) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. *All members of society should be able to form their own beliefs* and communicate them freely to others. In sum, the fundamental principle involved here is the people's right to know. *Freedom of speech and expression should, therefore, receive a generous support from all those who believe in the participation of people in the administration.*' " (emphasis supplied)

25. Even with regard to telecasting of events such as cricket, football and hockey etc. this Court in *Secy., Ministry of Information and Broadcasting, Govt. of India* v. *Cricket Assn. of Bengal*[11] held (at SCC p. 224, para 75) that "the right to freedom of speech and expression also includes the right to educate, to inform and to entertain and also the right to be educated, informed and entertained". The Court further held as under: (SCC p. 229, para 82)

> "82. ... *True democracy cannot exist unless all citizens have a right to participate in the affairs of the polity of the country. The right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of the issues, in respect of which they are called upon to express their views. One-sided information, disinformation, misinformation and non-information all equally create an uninformed citizenry which makes democracy a farce when medium of information is monopolised either by a partisan central authority or by private individuals or oligarchic organisations.* This is particularly so in a country like ours where about 65 per cent of the population is illiterate and hardly 1 1/2 per cent of the population has an access to the print media which is not subject to pre-censorship." (emphasis supplied)

26. The aforesaid passage leaves no doubt that right to participate by casting vote at the time of election would be meaningless unless the voters are well informed about all sides of the issues, in respect of which they are called upon to express their views by casting their votes. Disinformation, misinformation, non-information, all equally create an uninformed citizenry which would finally make democracy a mobocracy and farce. On this aspect, no further discussion is required. However, we would narrate some observations made by Bhagwati, J. (as he then was) in *S.P. Gupta* v. *Union of India*[12] while dealing with the contention of right to secrecy that: (SCC p. 274, para 66) "*There can be little doubt that exposure to public gaze and*

10 (1973) 3 All ER 54 : 1974 AC 273 : (1973) 3 WLR 298 (HL)
11 (1995) 2 SCC 161
12 1981 Supp SCC 87

scrutiny is one of the surest means of achieving a clean and healthy administration." (emphasis supplied) Further, it has been explicitly and lucidly held thus: (SCC p. 273, paras 64-65)

"*64.* Now it is obvious from the Constitution that we have adopted a democratic form of government. Where a society has chosen to accept democracy as its credal faith, it is elementary that the citizens ought to know what their Government is doing. *The citizens have a right to decide by whom and by what rules they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic Government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the Government.* It is only if people know how Government is functioning that they can fulfil the role which democracy assigns to them and make democracy a really effective participatory democracy. 'Knowledge' said James Madison, 'will forever govern ignorance and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular Government without popular information or the means of obtaining it, is but a prologue to a farce or tragedy or perhaps both'. The citizens' right to know the facts, the true facts, about the administration of the country is thus one of the pillars of a democratic State. And that is why the demand for openness in the Government is increasingly growing in different parts of the world.

65. The demand for openness in the Government is based principally on two reasons. It is now widely accepted that democracy does not consist merely in people exercising their franchise once in five years to choose their rules and, once the vote is cast, then retiring in passivity and not taking any interest in the Government. Today it is common ground that democracy has a more positive content and its orchestration has to be continuous and pervasive. *This means inter alia that people should not only cast intelligent and rational votes but should also exercise sound judgment on the conduct of the Government and the merits of public policies, so that democracy does not remain merely a sporadic exercise in voting but becomes a continuous process of Government — an attitude and habit of mind. But this important role people can fulfil in a democracy only if it is an open Government where there is full access to information in regard to the functioning of the Government.*"

(emphasis supplied)

It was further observed: (SCC p. 275, para 67)

"*67.* ... The concept of an open Government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(*a*). ... The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public

interest. It is in the context of this background that we must proceed to interpret Section 123 of the Indian Evidence Act."

27. From the aforesaid discussion it can be held that it is expected by all concerned and as has been laid down by various decisions of this Court that for survival of true democracy, the voter must be aware of the antecedents of his candidate. Voter has to cast intelligent and rational vote according to his own criteria. A well-informed voter is the foundation of democratic structure. That information to a voter, who is the citizen of this country, is one facet of the fundamental right under Article 19(1)(*a*).

Article 145(3) of the Constitution of India

28. Mr Arun Jaitley, learned Senior Counsel and Mr Kirit N. Raval, learned Solicitor-General submitted that the question involved in these petitions is a substantial question of law as to the interpretation of the Constitution and, therefore, the matter may be referred to a Bench consisting of five Judges.

29. In our view, this contention is totally misconceived. Article 19(1)(*a*) is interpreted in numerous judgments rendered by this Court. After considering various decisions and following tests laid therein, this Court in *Assn. for Democratic Reforms*[1] arrived at the conclusion that for survival of the democracy, right of the voter to know antecedents of a candidate would be part and parcel of his fundamental right. It would be the basis for free and fair election which is a basic structure of the Constitution. Therefore, the question relating to interpretation of Article 19(1)(*a*) is concluded and there is no other question which requires interpretation of the Constitution.

30. Dealing with a similar contention, a five-Judge Bench of this Court in *State of J&K* v. *Thakur Ganga Singh*[13] succinctly held thus: (AIR p. 359, para 7)

> "7. What does interpretation of a provision mean? Interpretation is the method by which the true sense or the meaning of the word is understood. The question of interpretation can arise only if two or more possible constructions are sought to be placed on a provision — one party suggesting one construction and the other a different one. But where the parties agree on the true interpretation of a provision or do not raise any question in respect thereof, it is not possible to hold that the case involves any question of law as to the interpretation of the Constitution. On an interpretation of Article 14, a series of decisions of this Court evolved the doctrine of classification. As we have pointed out, at no stage of the proceedings either the correctness of the interpretation of Article 14 or the principles governing the doctrine of classification have been questioned by either of the parties. Indeed accepting the said doctrine, the appellants contended that there was a valid classification under the rule while the respondents argued contra. The learned Additional Solicitor-General contended, for the first time, before us that the appeal raised a new facet of the doctrine of equality, namely, whether

13 AIR 1960 SC 356 : (1960) 2 SCR 346

an artificial person and a natural person have equal attributes within the meaning of the equality clause, and, therefore, the case involves a question of interpretation of the Constitution. This argument, if we may say so, involves the same contention in a different garb. If analysed, the argument only comes to this: as an artificial person and a natural person have different attributes, the classification made between them is valid. *This argument does not suggest a new interpretation of Article 14 of the Constitution, but only attempts to bring the rule within the doctrine of classification.* We, therefore, hold that the question raised in this case does not involve any question of law as to the interpretation of the Constitution." (emphasis supplied)

31. The aforesaid judgment is referred to and relied upon in *Sardar Sardul Singh Caveeshar* v. *State of Maharashtra*[14].

32. From the judgment rendered by this Court in *Assn. for Democratic Reforms*[1] it is apparent that no such contention was raised by the learned Solicitor-General, who appeared in appeal filed on behalf of the Union of India that question involved in that matter was required to be decided by a five-Judge Bench, as provided under Article 145(3) of the Constitution. The question raised before us has been finally decided and no other substantial question of law regarding the interpretation of the Constitution survives. Hence, the matter is not required to be referred to a five-Judge Bench.

Whether impugned Section 33-B can be considered as validating provision

33. The learned counsel for the respondent submitted that by the impugned legislation, most of the directions issued by the Court are complied with and vacuum pointed out is filled in by the legislation. It is their contention that the legislature did not think it fit that the remaining information as directed by this Court is required to be given by a contesting candidate.

34. This submission is, on the face of it, against well-settled legal position. In a number of decisions rendered by this Court, similar submission is negatived. The legislature has no power to review the decision and set it at naught except by removing the defect which is the cause pointed out by the decision rendered by the Court. If this is permitted it would sound the death knell of the rule of law as observed by this Court in various decisions. In *P. Sambamurthy* v. *State of A.P.*[15] this Court observed: (SCC p. 369, para 4)

> "*4.* ... It is a basic principle of the rule of law that the exercise of power by the executive or any other authority must not only be conditioned by the Constitution but must also be in accordance with law and the power of judicial review is conferred by the Constitution with a view to ensuring that the law is observed and there is compliance with the requirement of law on the part of the executive and other authorities. It is through the power of judicial review conferred on an independent

14 AIR 1965 SC 682 : (1964) 2 SCR 378 : (1965) 1 Cri LJ 608 sub nom *Bhagwan Swarup Lal Bishan Lal* v. *State of Maharashtra*

15 (1987) 1 SCC 362 : (1987) 2 ATC 502

institutional authority such as the High Court that the rule of law is maintained and every organ of the State is kept within the limits of the law. *Now if the exercise of the power of judicial review can be set at naught by the State Government by overriding the decision given against it, it would sound the death knell of the rule of law. The rule of law would cease to have any meaning, because then it would be open to the State Government to defy the law and yet to get away with it. The proviso to clause (5) of Article 371-D is therefore clearly violative of the basic structure doctrine.*" (emphasis supplied)

35. In *Cauvery Water Disputes Tribunal, In re*[16] the Court referred to and relied upon the decision in *P. Sambamurthy*[15]. In that case, the Court dealt with the validity of the Karnataka Cauvery Basin Irrigation Protection Ordinance, 1991 issued by the Government of Karnataka giving overriding effect that notwithstanding anything contained in any order, report or decision of any court or tribunal except the final decision under the provisions of sub-section (2) of Section 5 read with Section 6 of the Inter-State Water Disputes Act, 1956 shall have any effect and held that the Ordinance in question which seeks directly to nullify the order of the Tribunal impinges on the judicial power of the State and is, therefore, ultra vires. After referring to the earlier decisions, the Court observed thus: (SCC pp. 141-42, paras 74 & 76)

"*74.* ... it would be unfair to adopt legislative procedure to undo a settlement which had become the basis of a decision of the High Court. *Even if legislation can remove the basis of a decision, it has to do it by alteration of general rights of a class but not by simply excluding the specific settlement which had been held to be valid and enforceable* by a High Court. *The object of the Act was in effect to take away the force of the judgment* of the High Court. The rights under the judgment would be said to arise independently of Article 19 of the Constitution.

* * *

76. The principle which emerges from these authorities is that the legislature can change the basis on which a decision is given by the Court and thus change the law in general, which will affect a class of persons and events at large. It cannot, however, set aside an individual decision inter partes and affect their rights and liabilities alone. *Such an act on the part of the legislature amounts to exercising the judicial power of the State and to functioning as an appellate court or tribunal.*"

(emphasis supplied)

36. Further, in *Municipal Corpn. of the City of Ahmedabad* v. *New Shrock Spg. and Wvg. Co. Ltd.*[2] this Court (in SCC pp. 285-86, para 7) held thus:

"But no Legislature in this country has power to ask the instrumentalities of the State to disobey or disregard the decisions given by courts. The limits of the power of Legislatures to interfere with the directions issued by courts were considered by several decisions of this

16 1993 Supp (1) SCC 96 (2)

Court. In *Shri Prithvi Cotton Mills Ltd.* v. *Broach Borough Municipality*[17] our present Chief Justice speaking for the Constitution Bench of the Court observed:

> 'Before we examine Section 3 to find out whether it is effective in its purpose or not we may say a few words about validating statutes in general. When a Legislature sets out to validate a tax declared by a court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. The most important condition of course, is that the Legislature must possess the power to impose the tax, for, if it does not, the action must ever remain ineffective and illegal. *Granted legislative competence, it is not sufficient to declare merely that the decision of the court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the Legislature does not possess or exercise. A court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances.* Ordinarily, a court holds a tax to be invalidly imposed because the power to tax is wanting or the statute or the rules or both are invalid or do not sufficiently create the jurisdiction. Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law.' (emphasis supplied)

In *Mahal Chand Sethia* v. *State of W.B.*[18] Mitter, J., speaking for the Court stated the legal position in these words:

> 'The argument of counsel for the appellant was that *although it was open to the State* Legislature by an Act and the Governor by an ordinance *to amend* the West Bengal Criminal Law Amendment (Special Courts) Act, 1949, *it was incompetent for either of them to validate an order of transfer which had already been quashed* by the issue of a writ of certiorari by the High Court and the order of transfer being virtually dead, could not be resuscitated by the Governor or the Legislature and the validating measures could not touch any adjudication by the Court.
>
> *... A court of law can pronounce upon the validity of any law and declare the same to be null and void if it was beyond the legislative competence of the Legislature or if it infringed the rights enshrined in Part III of the Constitution. Needless to add it can strike down or declare invalid any Act or direction of a State Government*

17 (1969) 2 SCC 283
18 1969 UJ (SC) 616

which is not authorised by law. The position of a Legislature is however different. It cannot declare any decision of a court of law to be void or of no effect.' " (emphasis supplied)

37. For the purpose of deciding these petitions, the principles emerging from various decisions rendered by this Court from time to time can *inter alia* be summarised thus:

— the Legislature can change the basis on which a decision is rendered by this Court and change the law in general. However, this power can be exercised subject to constitutional provision, particularly, legislative competence and if it is violative of fundamental rights enshrined in Part III of the Constitution, such law would be void as provided under Article 13 of the Constitution. The legislature also cannot declare any decision of a court of law to be void or of no effect.

38. As stated above, this Court has held that Article 19(1)(*a*) which provides for freedom of speech and expression would cover in its fold right of the voter to know specified antecedents of a candidate, who is contesting election. Once it is held that a voter has a fundamental right to know the antecedents of his candidate, that fundamental right under Article 19(1)(*a*) could be abridged by passing such legislation only as provided under Article 19(2) which provides as under:

"19. *Protection of certain rights regarding freedom of speech, etc.*—(1)

* * *

(2) Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence."

39. So legislative competence to interfere with a fundamental right enshrined in Article 19(1)(*a*) is limited as provided under Article 19(2).

40. Learned counsel for the respondents have not pointed out how the impugned legislation could be justified or saved under Article 19(2).

Derivative fundamental right

41. Learned Senior Counsel Mr Jaitley developed an ingenious submission that as there is no specific fundamental right of the voter to know the antecedents of a candidate, the declaration by this Court of such fundamental right can be held to be derivative, therefore, it is open to the legislature to nullify it by appropriate legislation.

42. In our view, this submission requires to be rejected as there is no such concept of derivative fundamental rights. Firstly, it should be properly understood that the fundamental rights enshrined in the Constitution such as, right to equality and freedoms have no fixed contents. From time to time, this Court has filled in the skeleton with soul and blood and made it vibrant. Since the last more than 50 years, this Court has interpreted Articles 14, 19

and 21 and given meaning and colour so that the nation can have a truly republic democratic society. This cannot be undone by such an Ordinance/Amended Act. For this, we would refer to the discussion by Mohan, J. in *Unni Krishnan, J.P.* v. *State of A.P.*[19] while considering the ambit of Article 21, he succinctly placed it thus: (SCC pp. 668-69, paras 25-27)

> "25. In *Kesavananda Bharati* v. *State of Kerala*[4] Mathew, J. stated therein that the *fundamental rights themselves have no fixed content, most of them are empty vessels into which each generation must pour its content in the light of its experience.* It is relevant in this context to remember that in building up a just social order it is sometimes imperative that the fundamental rights should be subordinated to directive principles.
>
> 26. In *Pathumma* v. *State of Kerala*[20] it has been stated:
>
> *'The attempt of the court should be to expand the reach and ambit of the fundamental rights rather than accentuate their meaning and content by process of judicial construction.... Personal liberty in Article 21 is of the widest amplitude.'*
>
> 27. In this connection, it is worthwhile to recall what was said of the American Constitution in *Missouri* v. *Holland*[21]:
>
> '[W]hen we are dealing with words that also are constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.' "
>
> (emphasis supplied)

43. Thereafter, the Court pointed out that several unenumerated rights fall within the ambit of Article 21 since personal liberty is of the widest amplitude and categorized them (in SCC pp. 669-70, para 30) thus:

> "(*1*) The right to go abroad. *Satwant Singh Sawhney* v. *D. Ramarathnam, A.P.O.*[22]
>
> (*2*) The right to privacy. *Gobind* v. *State of M.P.*[23] In this case reliance was placed on the American decision in *Griswold* v. *Connecticut*[24] (US at p. 510).
>
> (*3*) The right against solitary confinement. *Sunil Batra* v. *Delhi Admn.*[25] (SCC at p. 545).
>
> (*4*) The right against bar fetters. *Charles Sobraj* v. *Supdt., Central Jail*[26].

19 (1993) 1 SCC 645
20 (1978) 2 SCC 1
21 252 US 416, 433 : 64 L Ed 641 (1919)
22 AIR 1967 SC 1836 : (1967) 3 SCR 525
23 (1975) 2 SCC 148 : 1975 SCC (Cri) 468
24 381 US 479 : 14 L Ed 2d 510 (1965)
25 (1978) 4 SCC 494 : 1979 SCC (Cri) 155
26 (1978) 4 SCC 104 : 1978 SCC (Cri) 542

(*5*) The right to legal aid. *Madhav Hayawadanrao Hoskot* v. *State of Maharashtra*[27].

(*6*) The right to speedy trial. *Hussainara Khatoon (I)* v. *Home Secy., State of Bihar*[28].

(*7*) The right against handcuffing. *Prem Shankar Shukla* v. *Delhi Admn.*[29]

(*8*) The right against delayed execution. *T.V. Vatheeswaran* v. *State of T.N.*[30]

(*9*) The right against custodial violence. *Sheela Barse* v. *State of Maharashtra*[31].

(*10*) The right against public hanging. *Attorney General of India* v. *Lachma Devi*[32].

(*11*) Doctor's assistance. *Parmanand Katara* v. *Union of India*[33].

(*12*) Shelter. *Shantistar Builders* v. *Narayan Khimalal Totame*[34]."

44. Further, learned Senior Counsel Mr Sachar referred to the following decisions of this Court giving meaning to the phrase "freedom of speech and expression":

(*1*) *Romesh Thappar* v. *State of Madras*[9]

> Freedom of speech and expression includes freedom of propagation of ideas which is ensured by freedom of circulation.
>
> [AIR Headnote (*ii*)]

(*2*) *Brij Bhushan* v. *State of Delhi*[35]

> Pre-censorship of a journal is restriction on the liberty of press.
>
> (AIR para 9)

(*3*) *Hamdard Dawakhana* v. *Union of India*[36]

> *Advertisements* meant for propagation of ideas or furtherance of literature or human thought is a part of freedom of speech and expression. (AIR p. 563, para 17)

(*4*) *Sakal Papers (P) Ltd.* v. *Union of India*[37]

> Freedom of speech and expression carries with it the right *to publish* and circulate one's ideas, opinions and views.
>
> (AIR p. 311, para 29)

27 (1978) 3 SCC 544 : 1978 SCC (Cri) 468
28 (1980) 1 SCC 81 : 1980 SCC (Cri) 23
29 (1980) 3 SCC 526 : 1980 SCC (Cri) 815
30 (1983) 2 SCC 68 : 1983 SCC (Cri) 342
31 (1983) 2 SCC 96 : 1983 SCC (Cri) 353
32 1989 Supp (1) SCC 264 : 1989 SCC (Cri) 413
33 (1989) 4 SCC 286 : 1989 SCC (Cri) 721
34 (1990) 1 SCC 520
35 AIR 1950 SC 129 : (1950) 51 Cri LJ 1525
36 AIR 1960 SC 554 : 1960 Cri LJ 735
37 AIR 1962 SC 305

(*5*) *Bennett Coleman and Co.* v. *Union of India*[38]

Freedom of press means right of citizens *to speak, publish and express their views as well as right of people to read.* (SCC p. 813, para 45)

(*6*) *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*[8]

"Freedom of expression, as learned writers have observed, has four broad social purposes to serve: (*i*) it helps an individual to attain self-fulfilment, (*ii*) it assists in the discovery of truth, (*iii*) it strengthens the capacity of an individual in participating in decision-making and (*iv*) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change." (SCC p. 686, para 68)

(*7*) *Odyssey Communications (P) Ltd.* v. *Lokvidayan Sanghatana*[39]

Freedom of speech and expression includes right of *citizens to exhibit films on Doordarshan.* (SCC p. 414, para 5)

(*8*) *S. Rangarajan* v. *P. Jagjivan Ram*[40]

Freedom of speech and expression means the right to express one's opinion by words of mouth, writing, printing, picture *or in any other manner.* It would thus include the freedom of communication and the right to propagate or publish opinion. (SCC p. 582, para 8)

(*9*) *LIC of India* v. *Manubhai D. Shah*[41]

Freedom of speech and expression is a natural right which a human being acquires by birth. It is, therefore, a basic human right (Article 19 of Universal Declaration of Human Rights relied on.) Every citizen, therefore, has a right to air his or her views through the printing and/or electronic media or through any communication method. (SCC pp. 648 & 650, paras 5 & 8)

(*10*) *Secy., Ministry of Information and Broadcasting, Govt. of India* v. *Cricket Assn. of Bengal*[11]

"*3.* (*b*) The right of free speech and expression includes the right to receive and impart information. For ensuring the free speech right of the citizens of this country, it is necessary that the citizens have the benefit of plurality of views and a range of opinions on all public issues. *A successful democracy posits an 'aware' citizenry.* Diversity of opinions, views, ideas and ideologies is essential to enable the citizens to arrive at informed judgment on all issues touching them." (emphasis supplied) (SCC p. 300, para 201)

(*11*) *S.P. Gupta* v. *Union of India*[12]

Right to know is implicit in the right of free speech and expression. *Disclosure of information regarding functioning of the Government must be the rule.* (SCC p. 275, para 67)

38 (1972) 2 SCC 788
39 (1988) 3 SCC 410
40 (1989) 2 SCC 574
41 (1992) 3 SCC 637

(*12*) *State of U.P.* v. *Raj Narain*[7]

Freedom of speech and expression includes the right to know every public act, everything that is done in a public way, by their public functionaries. (SCC p. 453, para 74)

(*13*) *Dinesh Trivedi, MP* v. *Union of India*[42]

Freedom of speech and expression *includes right of the citizens to know about the affairs of the Government.* (SCC p. 313, para 16)

45. There are many other judgments which are not required to be reiterated in this judgment. All these developments of law giving meaning to freedom of speech and expression or personal liberty are not required to be reconsidered nor could there be legislation so as to nullify such interpretation except as provided under the exceptions to fundamental rights.

46. Learned counsel for the respondents relied upon *R. Rajagopal* v. *State of T.N.*[43] and submitted that in the said case the Court observed that right to privacy is not enumerated as a fundamental right in our Constitution but has been inferred from Article 21. In that case, reliance was placed on *Kharak Singh* v. *State of U.P.*[44], *Gobind* v. *State of M.P.*[23] and other decisions of English and American courts and thereafter, the Court held that the petitioners have a right to publish what they alleged to be a life story/autobiography of Auto Shankar insofar as it appears from the public records, even without his consent or authorisation. But if they go beyond that and publish his life story, they may be invading his right to privacy for the consequences in accordance with law. For this purpose, the Court held that a citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent — whether truthful or otherwise and whether laudatory or critical. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy. The Court also pointed out an exception namely: [SCC p. 650, para 26(2)]

> "This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency [Article 19(2)] an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicised in press/media."

47. From the aforesaid observations learned Solicitor-General Mr Raval and learned Senior Counsel Mr Jaitley contended that rights which are derivatives would be subject to reasonable restriction. Secondly, it was sought to be contended that by insisting for declaration of assets of a candidate, right

42 (1997) 4 SCC 306

43 (1994) 6 SCC 632

44 AIR 1963 SC 1295 : (1964) 1 SCR 332 : (1963) 2 Cri LJ 329

to privacy is affected. In our view, the aforesaid decision nowhere supports the said contention. This Court only considered — to what extent a citizen would have right to privacy under Article 21. The Court itself has carved out the exceptions and restrictions on absolute right of privacy. Further, by declaration of a fact, which is a matter of public record that a candidate was involved in various criminal cases, there is no question of infringement of any right of privacy. Similarly, with regard to the declaration of assets also, a person having assets or income is normally required to disclose the same under the Income Tax Act or such similar fiscal legislation. Not only this, but once a person becomes a candidate to acquire public office, such declaration would not affect his right of privacy. This is the necessity of the day because of statutory provisions of controlling widespread corrupt practices as repeatedly pointed out by all concerned including various reports of the Law Commission and other committees as stated above.

48. Even the Prime Minister of India in one of his speeches has observed to the same effect. This has been reproduced in *B.R. Kapur case*[6] by Pattanaik, J. (as he then was) (in SCC p. 314, para 74) as under:

> "Mr Divan in course of his arguments, had raised some submissions on the subject — '*Criminalisation of Politics*' and participation of criminals in the electoral process as candidates and in that connection, he had brought to our notice the order of the Election Commission of India dated 28-8-1997. ... — 'Whither Accountability', published in *The Pioneer*, Shri Atal Behari Vajpayee had called for a national debate on all the possible alternatives for systematic changes to cleanse our democratic governing system of its present mess. He has expressed his dissatisfaction that neither Parliament nor the State Vidhan Sabhas are doing, with any degree of competence or commitment, what they are primarily meant to do: legislative function. According to him, barring exceptions, those who get elected to these democratic institutions are neither trained, formally or informally, in law-making nor do they seem to have an inclination to develop the necessary knowledge and competence in their profession. He has further indicated that those individuals in society who are generally interested in serving the electorate and performing legislative functions are finding it increasingly difficult to succeed in today's electoral system and the *electoral system has been almost totally subverted by money power, muscle power, and vote bank considerations of castes and communities.* Shri Vajpayee also had indicated that the corruption in the governing structures has, therefore, corroded the very core of elective democracy. According to him, the certainty of scope of corruption in the governing structure has heightened opportunism and unscrupulousness among political parties, causing them to marry and divorce one another at will, seek opportunistic alliances and coalitions often without the popular mandate. *Yet they capture and survive in power due to inherent systematic flows.* He further stated that casteism, corruption and politicisation have eroded the integrity and efficacy of our civil service structure also. *The manifestos,*

policies, programmes of the political parties have lost meaning in the present system of governance due to lack of accountability."

(emphasis supplied)

49. Further, this Court while dealing with the election expenses observed in *Common Cause* v. *Union of India*[45] thus: (SCC p. 761, para 18)

"*18.* ... Flags go up, walls are painted, and hundreds of thousands of loudspeakers play out the loud exhortations and extravagant promises. VIPs and VVIPs come and go, some of them in helicopters and air taxis. *The political parties in their quest for power spend more than one thousand crore of rupees on the General Election (Parliament alone), yet nobody accounts for the bulk of the money so spent and there is no accountability anywhere. Nobody discloses the source of the money. There are no proper accounts and no audit. From where does the money come nobody knows.* In a democracy where rule of law prevails this type of naked display of black money, by violating the mandatory provisions of law, cannot be permitted." (emphasis supplied)

50. To combat this naked display of unaccounted/black money by the candidate, declaration of assets is likely to have a check on violation of the provisions of the Act and other relevant Acts including the Income Tax Act.

51. Further, the doctrine of parliamentary sovereignty as it obtains in England does not prevail here except to the extent and in the fields provided by the Constitution. The entire scheme of the Constitution is such that it ensures the sovereignty and integrity of the country as a republic and the democratic way of life by parliamentary institutions based on free and fair elections.

52. In *P.V. Narasimha Rao* v. *State (CBI/SPE)*[46] this Court observed thus: (SCC p. 673, para 47)

"*47.* ... Parliamentary democracy is a part of the basic structure of the Constitution. ... It is settled law that in interpreting the constitutional provisions the court should adopt a construction which strengthens the foundational features and the basic structure of the Constitution. (See: *Sub-Committee on Judicial Accountability* v. *Union of India*[47], SCC at p. 719.)"

53. In *C. Narayanaswamy* v. *C.K. Jaffer Sharief*[48] the Court observed (in SCC p. 186, para 22) thus:

"If the call for 'purity of elections' is not to be reduced to a lip service or a slogan, then the persons investing funds, in furtherance of the prospect of the election of a candidate must be identified and located. The candidate should not be allowed to plead ignorance about the persons who have made contributions and investments for the success of

45 (1996) 2 SCC 752
46 (1998) 4 SCC 626 : 1998 SCC (Cri) 1108
47 (1991) 4 SCC 699
48 1994 Supp (3) SCC 170

the candidate concerned at the election. But this has to be taken care of by Parliament."

54. In *T.N. Seshan, CEC of India* v. *Union of India*[49] this Court observed thus: (SCC p. 623, para 10)

> "*10.* The preamble of our Constitution proclaims that we are a Democratic Republic Democracy being the basic feature of our constitutional set-up, there can be no two opinions that free and fair elections to our legislative bodies alone would guarantee the growth of a healthy democracy in the country."

55. As observed in *Kesavananda Bharati case*[4] the fundamental rights themselves have no fixed content and it is also to be stated that the attempt of the Court should be to expand the reach and ambit of the fundamental rights. The Constitution is required to be kept young, energetic and alive. In this view of the matter, the contention raised by the learned counsel for the respondents, that as the phrase "freedom of speech and expression" is given the meaning to include citizens' right to know the antecedents of the candidates contesting election of MP or MLA, such rights could be set at naught by the legislature, requires to be rejected.

Right to vote is a statutory right

56. Learned counsel for the respondents vehemently submitted that right to elect or to be elected is a pure and simple statutory right and in the absence of statutory provision neither has the citizen a right to elect nor has he a right to be elected because such right is neither a fundamental right nor a common law right. It is, therefore, submitted that it cannot be held that a voter has any fundamental right of knowing the antecedents/assets of a candidate contesting the election. Learned Solicitor-General Mr Raval also submitted that on the basis of the decision rendered by this Court, the Act is amended by the impugned Ordinance/Amendment Act. However, for the directions which are left out, the presumption would be — it is deliberate omission on the part of the legislature and, therefore, there is no question of it being violative of Article 19(1)(*a*). He submitted that law pertaining to election depends upon statutory provisions. Right to vote, elect or to be elected depends upon statutory rights. For this purpose, he referred to the decision in *N.P. Ponnuswami* v. *Returning Officer*[50], *G. Narayanaswami* v. *G. Pannerselvam*[51] and *C. Narayanaswamy* v. *C.K. Jaffer Sharief*[48].

57. There cannot be any dispute that the right to vote or stand as a candidate for election and decision with regard to violation of election law is not a civil right but is a creature of statute or special law and would be subject to the limitations envisaged therein. It is for the legislature to examine and provide provisions relating to validity of election and the jurisdiction of the Court would be limited in accordance with such law which creates such Election Tribunal.

49 (1995) 4 SCC 611
50 AIR 1952 SC 64 : 1952 SCR 218
51 (1972) 3 SCC 717

58. In the case of *N.P. Ponnuswami*[50] a person whose nomination paper was rejected, filed a writ of certiorari, which was dismissed on the ground that it had no jurisdiction to interfere with the order of the Returning Officer by reason of Article 329(*b*) of the Constitution.

59. In the case of *G. Narayanaswami*[51] this Court was dealing with an election petition wherein the issue which was required to be decided was whether the respondent was not qualified to stand for election to the graduates' constituency on all or any of the grounds set out by the petitioner in paras 7 to 9 of the election petition. The Court referred to Article 171 and thereafter observed that the term "electorate" used in Articles 171(3)(*a*), (*b*) and (*c*) has neither been defined by the Constitution nor in any enactment by Parliament. The Court thereafter referred to the definition of "elector" given in Section 2(1)(*a*) of the RP Act and held that considering the language as well as the legislative history of Articles 171 and 173 of the Constitution and Section 6 of the RP Act, there could be a presumption of deliberate omission of the qualification that the representative of the graduates should also be a graduate.

60. Similarly, in *C. Narayanaswamy case*[48] the Court was dealing with the validity of an election of a candidate on the ground of alleged corrupt practice as provided under Section 123(1)(*A*) of the Act and in that context the Court held that right of a person to question the validity of an election is dependent on conditions prescribed in the different sections of the Act and the rules framed thereunder. The Court thereafter held that as the Act does not provide that any expenditure incurred by a political party or by any other association or body of persons or any individual other than the candidate or his election agent, it shall not be deemed to be expenditure in connection with the election or authorised by a candidate or his election agent for the purpose of sub-section (1) of Section 77 read with Rule 90.

61. Learned counsel further referred to the decision in *Jyoti Basu* v. *Debi Ghosal*[52] wherein similar observations are made by this Court while deciding election petition: (SCC p. 696, para 8)

> "*8.* A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. ... Concepts familiar to common law and equity must remain strangers to election law unless statutorily embodied. A court has no right to resort to them on considerations of alleged policy because policy in such matters as those, relating to the trial of election disputes, is what the statute lays down. ... We have already referred to the scheme of the Act. We have noticed the necessity to rid ourselves of notions based on common law or

52 (1982) 1 SCC 691 : (1982) 3 SCR 318

equity. We see that we must seek an answer to the question within the four corners of the statute. What does the Act say?"

62. It has to be stated that in an election petition challenging the validity of election, rights of the parties are governed by the statutory provisions for setting aside the election but this would not mean that a citizen who has right to be a voter and elect his representative in the Lok Sabha or Legislative Assembly has no fundamental right. Such a voter who is otherwise eligible to cast vote to elect his representative has statutory right under the Act to be a voter and has also a fundamental right as enshrined in Chapter III. Merely because a citizen is a voter or has a right to elect his representative as per the Act, his fundamental rights could not be abridged, controlled or restricted by statutory provisions except as permissible under the Constitution. If any statutory provision abridges fundamental right, that statutory provision would be void. It also requires to be well understood that democracy based on adult franchise is part of the basic structure of the Constitution. The right of an adult to take part in election process either as a voter or a candidate could be restricted by a valid law which does not offend constitutional provisions. Hence, the aforesaid judgments have no bearing on the question whether a citizen who is a voter has fundamental right to know the antecedents of his candidate. It cannot be held that as there is deliberate omission in law, the right of the voter to know the antecedents of the candidates, which is his fundamental right under Article 19(1)(*a*), is taken away.

63. Mr Raval, learned Solicitor-General submitted that an enactment cannot be struck down on the ground that the Court thinks it unjustified. Members of Parliament or the Legislature are representatives of the people and are supposed to know and be aware of what is good and bad for the people. The Court cannot sit in judgment over their wisdom. He relied upon the decision rendered by this Court in *P. Nalla Thampy Terah (Dr)* v. *Union of India*[53] wherein the Court considered the validity of Section 77(1) of the Act and referred to *Report of the Santhanam Committee on Prevention of Corruption*, which says: (SCC p. 198, para 10)

> "The public belief in the prevalence of corruption at high political levels has been strengthened by the manner in which funds are collected by political parties, especially at the time of elections. Such suspicions attach not only to the ruling party but to all parties, as often the opposition can also support private vested interests as well as members of the government party. It is, therefore, essential that the conduct of political parties should be regulated in this matter by strict principles in relation to collection of funds and electioneering. It has to be frankly recognised that political parties cannot be run and elections cannot be fought without large funds. But these funds should come openly from the supporters or sympathisers of the parties concerned."

53 1985 Supp SCC 189

64. The Court also referred to various decisions and thereafter held thus: (SCC pp. 199-200, para 13)

> "*13.* We have referred to this large data in order to show that the influence of big money on the election process is regarded universally as an evil of great magnitude. *But then, the question which we, as Judges, have to consider is whether the provision contained in Explanation 1 suffers from any constitutional infirmity and, particularly, whether it violates Article 14.* On that question we find it difficult, reluctantly though, to accept the contention that Explanation 1 offends against the right to equality. Under that provision, (*i*) a political party or (*ii*) any other association or body of persons or (*iii*) any individual, other than the candidate or his election agent, can incur expenses, without any limitation whatsoever, in connection with the election of a candidate. Such expenses are not deemed to be expenditure in connection with the election, incurred or authorised by the candidate or by his election agent for the purposes of Section 77(1)." (emphasis supplied)

65. Learned Solicitor-General heavily relied upon para 19, wherein the Court observed thus: (SCC p. 204)

> "*19.* The petitioner is not unjustified in criticising the provision contained in Explanation 1 as diluting the principle of free and fair elections, which is the cornerstone of any democratic polity. *But, it is not for us to lay down policies in matters pertaining to elections. If the provisions of the law violate the Constitution, they have to be struck down.* We cannot, however, negate a law on the ground that we do not approve of the policy which underlies it." (emphasis supplied)

66. From the aforesaid discussion it is apparent that the Court in that case was dealing with the validity of Explanation 1 and was deciding whether it suffered from any constitutional infirmity, particularly, whether it was violative of Article 14. The question of Article 19(1)(*a*) was not required to be considered and the Court had not even touched it. At the same time, there cannot be any dispute that if the provisions of the law violate the constitutional provisions, they have to be struck down and that is what is required to be done in the present case. It is made clear that no provision is nullified on the ground that the Court does not approve the underlying policy of the enactment.

67. As against this, Mr Sachar, learned Senior Counsel rightly referred to a decision rendered by this Court in *Bennett Coleman & Co.* v. *Union of India*[38] where similar contentions were raised and negatived while imposing restrictions by the Newspaper Control Order. The Court's relevant discussion is as under: (SCC pp. 809-10, paras 31-33)

> "*31.* Article 19(1)(*a*) provides that all citizens shall have the right to freedom of speech and expression, Article 19(2) states that nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said

sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. *Although Article 19(1)(a) does not mention the freedom of the press, it is the settled view of this Court that freedom of speech and expression includes freedom of the press and circulation.*

32. In the *Express Newspapers case*[8] it is said that there can be no doubt that liberty of the press is an essential part of the freedom of speech and expression guaranteed by Article 19(1)(*a*). The press has the right of free propagation and free circulation without any previous restraint on publication. *If a law were to single out the press for laying down prohibitive burdens on it that would restrict the circulation, penalise its freedom of choice as to personnel, prevent newspapers from being started and compel the press to government aid. This would violate Article 19(1)(a) and would fall outside the protection afforded by Article 19(2).*

33. In *Sakal Papers case*[37] it is said that the freedom of speech and expression guaranteed by Article 19(1) gives a citizen the right to propagate and publish his ideas to disseminate them, to circulate them either by words of mouth or by writing. This right extends not merely to the matter it is entitled to circulate but also to the volume of circulation. In *Sakal Papers case*[37] the Newspaper (Price and Page) Act, 1956 empowered the Government to regulate the prices of newspapers in relation to their pages and sizes and to regulate the allocation of space for advertisement matter. The Government fixed the maximum number of pages that might be published by a newspaper according to the price charged. The Government prescribed the number of supplements that would be issued. This Court held that the Act and the Order placed restraints on the freedom of the press to circulate. *This Court also held that the freedom of speech could not be restricted for the purpose of regulating the commercial aspects of activities of the newspapers.*"

(emphasis supplied)

68. The Court also dealt with the contention that newsprint policy does not directly deal with the fundamental right mentioned in Article 19(1)(*a*). It was also contended that regulatory statutes which do not control the content of speech but incidentally limit the ventured exercise are not regarded as a type of law. Any incidental limitation or incidental restriction on freedom of speech is permissible as the same is essential to the furtherance of important governmental interest in regulating speech and freedom. The Court negatived the said contention and in para 39 held thus: (SCC p. 812)

"*39.* Mr Palkhivala said that the tests of pith and substance of the subject-matter and of direct and of incidental effect of the legislation are relevant to questions of legislative competence but they are irrelevant to the question of infringement of fundamental rights. In our view this is a sound and correct approach to interpretation of legislative measures and State action in relation to fundamental rights. *The true test is whether the*

effect of the impugned action is to take away or abridge fundamental rights. If it be assumed that the direct object of the law or action has to be direct abridgement of the right of free speech by the impugned law or action it is to be related to the directness of effect and not to the directness of the subject-matter of the impeached law or action. The action may have a direct effect on a fundamental right although its direct subject-matter may be different." (emphasis supplied)

The Court observed in SCC para 80 at p. 823:

"The faith in the popular Government rests on the old dictum, 'let the people have the truth and the freedom to discuss it and all will go well'. The liberty of the press remains an 'Art of the Covenant' in every democracy."

69. Further, the freedom of speech and expression, as has been held repeatedly, is basic to and indivisible from a democratic polity. It includes right to impart and receive information. (*Secy., Min. of Information & Broadcasting*[11].) Restriction to the said right could be only as provided in Article 19(2). This aspect is also discussed in SCC para 151 (p. 270) thus:

"*151.* Article 19(1)(*a*) declares that all citizens shall have the right of freedom of speech and expression. Clause (2) of Article 19, at the same time, provides that nothing in sub-clause (*i*) of clause (1) shall affect the operation of any existing law or prevent the State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with the foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement of an offence. The grounds upon which reasonable restrictions can be placed upon the freedom of speech and expression are designed firstly to ensure that the said right is not exercised in such a manner as to threaten the sovereignty and integrity of India, security of the State, friendly relations with the foreign States, public order, decency or morality. Similarly, the said right cannot be so exercised as to amount to contempt of court, defamation or incitement of an offence. Existing laws providing such restrictions are saved and the State is free to make laws in future imposing such restrictions. The grounds aforesaid are conceived in the interest of ensuring and maintaining conditions in which the said right can meaningfully and peacefully be exercised by the citizens of this country."

70. Hence, in our view, right of a voter to know the biodata of a candidate is the foundation of democracy. The old dictum — let the people have the truth and the freedom to discuss it and all will go well with the Government — should prevail.

71. The true test for deciding the validity of the Act is — whether it takes away or abridges fundamental rights of the citizens. If there is direct abridgement of the fundamental right of freedom of speech and expression, the law would be invalid.

72. Before parting with the case, there is one aspect which is to be dealt with. After the judgment in *Assn. for Democratic Reforms case*[1] the Election Commission gave certain directions in implementation of the judgment by its Order No. 3/ER/2002/JS-II/Vol-III, dated 28-6-2002. In the course of arguments, learned Solicitor-General as well as learned Senior Counsel appearing for the intervener (BJP) pointed out that Direction 4 is beyond the competence of the Election Commission and moreover, it is not necessary to give effect to the judgment of this Court. The said direction reads as follows:

> "Furnishing of any wrong or incomplete information or suppression of any material information by any candidate in or from the said affidavit may also result in the rejection of his nomination paper where such wrong or incomplete information or suppression of material information is considered by the Returning Officer to be a defect of substantial character, apart from inviting penal consequences under the Indian Penal Code for furnishing wrong information to a public servant or suppression of material facts before him:
>
> Provided that only such information shall be considered to be wrong or incomplete or amounting to suppression of material information as is capable of easy verification by the Returning Officer by reference to documentary proof adduced before him in the summary inquiry conducted by him at the time of scrutiny of nominations under Section 36(2) of the Representation of the People Act, 1951, and only the information so verified shall be taken into account by him for further consideration of the question whether the same is a defect of substantial character."

73. While no exception can be taken to the insistence of affidavit with regard to the matters specified in the judgment in *Assn. for Democratic Reforms case*[1] the direction to reject the nomination paper for furnishing wrong information or concealing material information and providing for a summary enquiry at the time of scrutiny of the nominations, cannot be justified. In the case of assets and liabilities, it would be very difficult for the Returning Officer to consider the truth or otherwise of the details furnished with reference to the "documentary proof". Very often, in such matters the documentary proof may not be clinching and the candidate concerned may be handicapped to rebut the allegation then and there. If sufficient time is provided, he may be able to produce proof to contradict the objector's version. It is true that the aforesaid directions issued by the Election Commission are not under challenge but at the same time *prima facie* it appears that the Election Commission is required to revise its instructions in the light of directions issued in *Assn. for Democratic Reforms case*[1] and as provided under the Representation of the People Act and its Third Amendment.

74. Finally, after the amendment application was granted, the following additional contentions were raised:

> *1.* Notice should be issued to the Attorney-General as vires of the Act is challenged.

2. Parliament in its wisdom and after due deliberation has amended the Act and has also incorporated the directions issued by this Court in its earlier judgment in *Assn. for Democratic Reforms*[1] including the direction for declaration of assets and liabilities of every elected candidate for a House of Parliament. They are also required to declare assets of their spouse and dependent children.

75. The contention that notice is required to be issued to the Attorney-General as vires of the Act is challenged, is of no substance because "Union of India" is the party-respondent and on its behalf learned Solicitor-General is appearing before the Court. He has forcefully raised the contentions which were required to be raised at the time of hearing of the matter. So, service of notice to the learned Attorney-General would be nothing but empty formality and the contention is raised for the sake of raising such contention.

76. Further, we have also reproduced certain recommendations of the National Commission to Review the Working of the Constitution in the earlier paragraphs and have also relied upon the same. In the Report, the Commission has recommended that any person charged with any offence punishable with imprisonment for a maximum term of five years or more, should be disqualified for being chosen as, or for being, a Member of Parliament or Legislature of a State on the expiry of a period of one year from the date the charges were framed against him by the court in that offence. The Commission has also recommended that every candidate at the time of election must declare his assets and liabilities along with those of his close relatives and all candidates should be required under law to declare their assets and liabilities by an affidavit and the details so given by them should be made public. Again, the legislators should be required under law to submit their returns about their liabilities every year and a final statement in this regard at the end of their term of office. Many such other recommendations are reproduced in earlier paragraphs.

77. With regard to the second contention, it has already been dealt with in previous paragraphs.

78. What emerges from the above discussion can be summarised thus:

(*A*) The legislature can remove the basis of a decision rendered by a competent court thereby rendering that decision ineffective but the legislature has no power to ask the instrumentalities of the State to disobey or disregard the decisions given by the court. A declaration that an order made by a court of law is void is normally a part of the judicial function. The legislature cannot declare that decision rendered by the Court is not binding or is of no effect.

It is true that the legislature is entitled to change the law with retrospective effect which forms the basis of a judicial decision. This exercise of power is subject to constitutional provision, therefore, it cannot enact a law which is violative of fundamental right.

(*B*) Section 33-B which provides that notwithstanding anything contained in the judgment of any court or directions issued by the Election Commission, no candidate shall be liable to disclose or furnish

any such information in respect of his election which is not required to be disclosed or furnished under the Act or the rules made thereunder, is on the face of it beyond the legislative competence, as this Court has held that the voter has a fundamental right under Article 19(1)(*a*) to know the antecedents of a candidate for various reasons recorded in the earlier judgment as well as in this judgment.

The Amended Act does not wholly cover the directions issued by this Court. On the contrary, it provides that a candidate would not be bound to furnish certain information as directed by this Court.

(*C*) The judgment rendered by this Court in *Assn. for Democratic Reforms*[1] has attained finality, therefore, there is no question of interpreting constitutional provision which calls for reference under Article 145(3).

(*D*) The contention that as there is no specific fundamental right conferred on a voter by any statutory provision to know the antecedents of a candidate, the directions given by this Court are against the statutory provisions is, on the face of it, without any substance. In an election petition challenging the validity of an election of a particular candidate, the statutory provisions would govern respective rights of the parties. However, voters' fundamental right to know the antecedents of a candidate is independent of statutory rights under the election law. A voter is first citizen of this country and apart from statutory rights, he is having fundamental rights conferred by the Constitution. Members of a democratic society should be sufficiently informed so that they may cast their votes intelligently in favour of persons who are to govern them. Right to vote would be meaningless unless the citizens are well informed about the antecedents of a candidate. There can be little doubt that exposure to public gaze and scrutiny is one of the surest means to cleanse our democratic governing system and to have competent legislatures.

(*E*) It is established that fundamental rights themselves have no fixed content, most of them are empty vessels into which each generation must pour its content in the light of its experience. The attempt of the Court should be to expand the reach and ambit of the fundamental rights by process of judicial interpretation. During the last more than half a decade, it has been so done by this Court consistently. There cannot be any distinction between the fundamental rights mentioned in Chapter III of the Constitution and the declaration of such rights on the basis of the judgments rendered by this Court.

79. In the result, Section 33-B of the Amended Act is held to be illegal, null and void. However, this judgment would not have any retrospective effect but would be prospective. Writ petitions stand disposed of accordingly.

P. VENKATARAMA REDDI, J.— The width and amplitude of the right to information about the candidates contesting elections to Parliament or the State Legislature in the context of the citizen's right to vote broadly falls for consideration in these writ petitions under Article 32 of the Constitution.

While I respectfully agree with the conclusion that Section 33-B of the Representation of the People Act, 1951 does not pass the test of constitutionality, I have come across a limited area of disagreement on certain aspects, especially pertaining to the extent of disclosures that could be insisted upon by the Court in the light of legislation on the subject. Moreover, the importance and intricacies of the subject-matter and the virgin ground trodden by this Court in *Union of India* v. *Assn. for Democratic Reforms*[1] to bring the right to information of the voter within the sweep of Article 19(1)(*a*) has impelled me to elucidate and clarify certain crucial aspects. Hence, this separate opinion.

I. (1) Freedom of expression and right to information

81. In the Constitution of our democratic Republic, among the fundamental freedoms, freedom of speech and expression shines radiantly in the firmament of Part III. We must take legitimate pride that this cherished freedom has grown from strength to strength in the post-independence era. It has been constantly nourished and shaped to new dimensions in tune with the contemporary needs by the constitutional courts. Barring a few aberrations, the executive government and the political parties too have not lagged behind in safeguarding this valuable right which is the insignia of the democratic culture of a nation. Nurtured by this right, press and electronic media have emerged as powerful instruments to mould the public opinion and to educate, entertain and enlighten the public.

82. Freedom of speech and expression, just as the equality clause and the guarantee of life and liberty, has been very broadly construed by this Court right from the 1950s. It has been variously described as a "basic human right", "a natural right" and the like. It embraces within its scope the freedom of propagation and interchange of ideas, dissemination of information which would help formation of one's opinion and viewpoint and debates on matters of public concern. The importance which our Constitution-makers wanted to attach to this freedom is evident from the fact that reasonable restrictions on that right could be placed by law only on the limited grounds specified in Article 19(2), not to speak of inherent limitations of the right.

83. In due course of time, several species of rights unenumerated in Article 19(1)(*a*) have branched off from the genus of the article through the process of interpretation by this Apex Court. One such right is the "right to information". Perhaps, the first decision which has adverted to this right is *State of U.P.* v. *Raj Narain*[7]. "The right to know", it was observed (at SCC p. 453, para 74) by Mathew, J.

> "which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security".

It was said very aptly: (SCC p. 453, para 74)

> "*74.* In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few

secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries."

84. The next milestone which showed the way for concretizing this right is the decision in *S.P. Gupta* v. *Union of India*[12] in which this Court dealt with the issue of High Court Judges' transfer. Bhagwati, J. observed: (SCC p. 275, para 67)

> "The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(*a*). Therefore, disclosure of information in regard to the functioning of Government must be the rule and secrecy an exception...."

85. People's right to know about governmental affairs was emphasized in the following words: (SCC p. 273, para 64)

> "No democratic Government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the Government. It is only if people know how Government is functioning that they can fulfil the role which democracy assigns to them and make democracy a really effective participatory democracy."

86. These two decisions have recognized that the right of the citizens to obtain information on matters relating to public acts flows from the fundamental right enshrined in Article 19(1)(*a*). The pertinent observations made by the learned Judges in these two cases were in the context of the question whether the privilege under Section 123 of the Evidence Act could be claimed by the State in respect of the Blue Book in the first case i.e. *Raj Narain case*[7] and the file throwing light on the consultation process with the Chief Justice, in the second case. Though the scope and ambit of Article 19(1)(*a*) vis-à-vis the right to information did not directly arise for consideration in those two landmark decisions, the observations quoted supra have a certain amount of relevance in evaluating the nature and character of the right.

87. Then, we have the decision in *Dinesh Trivedi* v. *Union of India*[42]. This Court was confronted with the issue whether background papers and investigatory reports which were referred to in *Vohra Committee's Report* could be compelled to be made public. The following observations of Ahmadi, C.J. are quite pertinent: (SCC p. 313, para 16)

> "*16.* In modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare. However, like all other rights, even this right has recognized limitations; it is, by no means, absolute."

88. The proposition expressed by Mathew, J. in *Raj Narain case*[7] was quoted with approval.

89. The next decision which deserves reference is the case of *Secy., Ministry of I&B* v. *Cricket Assn. of Bengal*[11]. Has an organizer or producer of

any event a right to get the event telecast through an agency of his choice, whether national or foreign? That was the primary question decided in that case. It was highlighted that the right to impart and receive information is a part of the fundamental right under Article 19(1)(*a*) of the Constitution. On this point, Sawant, J. had this to say at SCC p. 251, para 122(*ii*):

> "*122.* (*ii*) The right to impart and receive information is a species of the right of freedom of speech and expression guaranteed by Article 19(1)(*a*) of the Constitution. A citizen has a fundamental right to use the best means of imparting and receiving information and as such to have an access to telecasting for the purpose. However, this right to have an access to telecasting has limitations on account of the use of the public property...."

90. Jeevan Reddy, J. spoke more or less in the same voice: (SCC p. 300, para 201)

> "*3.* (*b*) The right of free speech and expression includes the right to receive and impart information. For ensuring the free speech right of the citizens of this country, it is necessary that the citizens have the benefit of plurality of views and a range of opinions on all public issues. A successful democracy posits an 'aware' citizenry. Diversity of opinions, views, ideas and ideologies is essential to enable the citizens to arrive at informed judgment on all issues touching them."

91. A conspectus of these cases would reveal that the right to receive and impart information was considered in the context of privilege pleaded by the State in relation to confidential documents relating to public affairs and the freedom of electronic media in broadcasting/telecasting certain events.

I. (2) Right to information in the context of the voter's right to know the details of contesting candidates and the right of the media and others to enlighten the voter

92. For the first time in *Union of India* v. *Assn. for Democratic Reforms*[1] which is the forerunner to the present controversy, the right to know about the candidate standing for election has been brought within the sweep of Article 19(1)(*a*). There can be no doubt that by doing so, a new dimension has been given to the right embodied in Article 19(1)(*a*) through a creative approach dictated by the need to improve and refine the political process of election. In carving out this right, the Court had not traversed a beaten track but took a fresh path. It must be noted that the right to information evolved by this Court in the said case is qualitatively different from the right to get information about public affairs or the right to receive information through the press and electronic media, though to a certain extent, there may be overlapping. The right to information of the voter/citizen is sought to be enforced against an individual who intends to become a public figure and the information relates to his personal matters. Secondly, that right cannot materialize without the State's intervention. The State or its instrumentality has to compel a subject to make the information available to the public, by means of legislation or orders having the force of law. With respect, I am unable to share the view that it stands on the same footing as right to telecast

and the right to view sports and games or other items of entertainment through television (vide observations at para 38 of *Assn. for Democratic Reforms case*[1]). One more observation at SCC p. 314, para 30 to the effect that "the decision-making process of a voter would include his right to know about public functionaries who are required to be elected by him" needs explanation. Till a candidate gets elected and enters the House, it would not be appropriate to refer to him as a public functionary. Therefore, the right to know about a public act done by a public functionary to which we find reference in *Raj Narain case*[7] is not the same thing as the right to know about the antecedents of the candidate contesting the election. Nevertheless, the conclusion reached by the Court that the voter has such a right and that the right falls within the realm of freedom of speech and expression guaranteed by Article 19(1)(*a*) can be justified on good and substantial grounds. To this aspect, I will advert a little later. Before that, I would like to say that it would have been in the fitness of things if the case (*UOI* v. *Assn. for Democratic Reforms*[1]) was referred to the Constitution Bench as per the mandate of Article 145(3) for the reason that a new dimension has been added to the concept of freedom of expression so as to bring within its ambit a new species of right to information. Apparently, no such request was made at the hearing and all parties invited the decision of the three-Judge Bench. The law has been laid down therein elevating the right to secure information about a contesting candidate to the position of a fundamental right. That decision has been duly taken note of by Parliament and acted upon by the Election Commission. It has attained finality. At this stage, it would not be appropriate to set the clock back and refer the matter to the Constitution Bench to test the correctness of the view taken in that case. I agree with my learned Brother Shah, J. in this respect. However, I would prefer to give reasons of my own — may not be very different from what the learned Judge had expressed, to demonstrate that the proposition laid down by this Court rests on a firm constitutional basis.

93. I shall now proceed to elucidate as to how the right to know the details about the contesting candidate should be regarded as a part of the freedom of expression guaranteed by Article 19(1)(*a*). This issue has to be viewed from more than one angle — from the point of view of the voter, the public viz. representatives of the press, organizations such as the petitioners which are interested in taking up public issues and thirdly, from the point of view of the persons seeking election to the legislative bodies.

94. The trite saying that "democracy is for the people, of the people and by the people" has to be remembered forever. In a democratic republic, it is the will of the people that is paramount and becomes the basis of the authority of the Government. The will is expressed in periodic elections based on universal adult suffrage held by means of secret ballot. It is through the ballot that the voter expresses his choice or preference for a candidate. "Voting is formal expression of will or opinion by the person entitled to exercise the right on the subject or issue", as observed by this Court in *Lily*

Thomas v. *Speaker, Lok Sabha*[54] (SCC pp. 236-37, para 2) quoting from *Black's Law Dictionary*. The citizens of the country are enabled to take part in the government through their chosen representatives. In a parliamentary democracy like ours, the Government of the day is responsible to the people through their elected representatives. The elected representative acts or is supposed to act as a live link between the people and the Government. The people's representatives fill the role of law-makers and custodians of the Government. People look to them for ventilation and redressal of their grievances. They are the focal point of the will and authority of the people at large. The moment they put in papers for contesting the election, they are subjected to public gaze and public scrutiny. The character, strength and weakness of the candidate is widely debated. Nothing is therefore more important for sustenance of democratic polity than the voter making an intelligent and rational choice of his or her representative. For this, the voter should be in a position to effectively formulate his/her opinion and to ultimately express that opinion through ballot by casting the vote. The concomitant of the right to vote which is the basic postulate of democracy is thus twofold: first, formulation of opinion about the candidates and second, the expression of choice by casting the vote in favour of the preferred candidate at the polling booth. The first step is complementary to the other. Many a voter will be handicapped in formulating the opinion and making a proper choice of the candidate unless the essential information regarding the candidate is available. The voter/citizen should have at least the basic information about the contesting candidate, such as his involvement in serious criminal offences. To scuttle the flow of information — relevant and essential — would affect the electorate's ability to evaluate the candidate. Not only that, the information relating to the candidates will pave the way for public debate on the merits and demerits of the candidates. When once there is public disclosure of the relevant details concerning the candidates, the press, as a media of mass communication and voluntary organizations vigilant enough to channel the public opinion on right lines will be able to disseminate the information and thereby enlighten and alert the public at large regarding the adverse antecedents of a candidate. It will go a long way in promoting the freedom of speech and expression. That goal would be accomplished in two ways. It will help the voter who is interested in seeking and receiving information about the candidate to form an opinion according to his or her conscience and best of judgment and secondly, it will facilitate the press and voluntary organizations in imparting information on a matter of vital public concern. An informed voter — whether he acquires information directly by keeping track of disclosures or through the press and other channels of communication — will be able to fulfil his responsibility in a more satisfactory manner. An enlightened and informed citizenry would undoubtedly enhance democratic values. Thus, the availability of proper and relevant information about the candidate fosters and promotes the freedom of speech and expression both from the point of view of imparting and receiving the information. In turn, it would lead to the preservation of the integrity of

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electoral process which is so essential for the growth of democracy. Though I do not go to the extent of remarking that the election will be a farce if the candidates' antecedents are not known to the voters, I would say that such information will certainly be conducive to fairness in election process and integrity in public life. The disclosure of information would facilitate and augment the freedom of expression both from the point of view of the voter as well as the media through which the information is publicized and openly debated.

95. The problem can be approached from another angle. As observed by this Court in *Assn. for Democratic Reforms case*[1] a voter "speaks out or expresses by casting vote". Freedom of expression, as contemplated by Article 19(1)(*a*) which in many respects overlaps and coincides with freedom of speech, has manifold meanings. It need not and ought not to be confined to expressing something in words orally or in writing. The act of manifesting by action or language is one of the meanings given in *Ramanatha Aiyar's Law Lexicon* (edited by Justice Y.V. Chandrachud). Even a manifestation of an emotion, feeling etc. without words would amount to expression. The example given in *Collin's Dictionary of English Language* (1983 Reprint) is: "tears are an expression of grief", is quite apposite. Another shade of meaning is: "a look on the face that indicates mood or emotion; e.g.: a joyful expression". Communication of emotion and display of talent through music, painting etc. is also a sort of expression. Having regard to the comprehensive meaning of the phrase "expression", voting can be legitimately regarded as a form of expression. Ballot is the instrument by which the voter expresses his choice between candidates or in respect to propositions; and his "vote" is his choice or election, as expressed by his ballot (vide *A Dictionary of Modern Legal Usage*, 2nd Edn., by A. Garner Bryan). "Opinion expressed, resolution or decision carried, by voting" is one of the meanings given to the expression "vote" in the *New Oxford Illustrated Dictionary*. It is well settled and it needs no emphasis that the fundamental right of freedom of speech and expression should be broadly construed and it has been so construed all these years. In the light of this, the dictum of the Court that the voter "speaks out or expresses by casting a vote" is apt and well founded. I would only reiterate and say that freedom of voting by expressing preference for a candidate is nothing but freedom of expressing oneself in relation to a matter of prime concern to the country and the voter himself.

I. (3) Right to vote is a constitutional right though not a fundamental right but right to make choice by means of ballot is part of freedom of expression

96. The right to vote for the candidate of one's choice is of the essence of democratic polity. This right is recognized by our Constitution and it is given effect to in specific form by the Representation of the People Act. The Constituent Assembly Debates reveal that the idea to treat the voting right as a fundamental right was dropped; nevertheless, it was decided to provide for it elsewhere in the Constitution. This move found its expression in Article 326 which enjoins that

the elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than twenty-one* years of age, and is not otherwise disqualified under the Constitution or law on the ground of non-residence, unsoundness of mind, crime, corrupt or illegal practice — shall be entitled to be registered as voter at such election.

However, case after case starting from *Ponnuswami case*[50] characterized it as a statutory right. "The right to vote or stand as a candidate for election", it was observed in *Ponnuswami case*[50] (AIR p. 71, para 18) "is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it". It was further elaborated in the following words:

> "Strictly speaking, it is the sole right of the legislature to examine and determine all matters relating to the election of its own members, and if the legislature takes it out of its own hands and vests in a special tribunal an entirely new and unknown jurisdiction, that special jurisdiction should be exercised in accordance with the law which creates it."

97. In *Jyoti Basu* v. *Debi Ghosal*[52] this Court again pointed out in no uncertain terms that: (SCC p. 696, para 8)

> "*8.* A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right. It is pure and simple, a statutory right."

With great reverence to the eminent Judges, I would like to clarify that the right to vote, if not a fundamental right, is certainly a constitutional right. The right originates from the Constitution and in accordance with the constitutional mandate contained in Article 326, the right has been shaped by the statute, namely the RP Act. That, in my understanding, is the correct legal position as regards the nature of the right to vote in elections to the House of the People and Legislative Assemblies. It is not very accurate to describe it as a statutory right, pure and simple. Even with this clarification, the argument of the learned Solicitor-General that the right to vote not being a fundamental right, the information which at best facilitates meaningful exercise of that right cannot be read as an integral part of any fundamental right, remains to be squarely met. Here, a distinction has to be drawn between the conferment of the right to vote on fulfilment of requisite criteria and the culmination of that right in the final act of expressing choice towards a particular candidate by means of ballot. Though the initial right cannot be placed on the pedestal of a fundamental right, but, at the stage when the voter goes to the polling booth and casts his vote, his freedom to express arises. The casting of vote in favour of one or the other candidate tantamounts to expression of his opinion and preference and that final stage in the exercise of voting right marks the accomplishment of freedom of expression of the voter. That is where Article 19(1)(*a*) is attracted. Freedom of voting as distinct from right to vote is thus a

* Now 18 years

species of freedom of expression and therefore carries with it the auxiliary and complementary rights such as right to secure information about the candidate which are conducive to the freedom. None of the decisions of this Court wherein the proposition that the right to vote is a pure and simple statutory right was declared and reiterated, considered the question whether the citizen's freedom of expression is or is not involved when a citizen entitled to vote casts his vote in favour of one or the other candidate. The issues that arose in *Ponnuswami case*[50] and various cases cited by the learned Solicitor-General fall broadly within the realm of procedural or remedial aspects of challenging the election or the nomination of a candidate. None of these decisions, in my view, go counter to the proposition accepted by us that the fundamental right of freedom of expression sets in when a voter actually casts his vote. I, therefore, find no merit in the submission made by the learned Solicitor-General that these writ petitions have to be referred to a larger Bench in view of the apparent conflict. As already stated, the factual matrix and legal issues involved in those cases were different and the view, we are taking, does not go counter to the actual ratio of the said decisions rendered by the eminent Judges of this Court.

98. Reliance has been placed by the learned Solicitor-General on the Constitution Bench decision in *Jamuna Prasad Mukhariya* v. *Lachhi Ram*[55]. That was a case of special appeal to this Court against the decision of an Election Tribunal. Apart from assailing the finding of the Tribunal on the aspect of "corrupt practice", Sections 123(5) and 124(5) (as they stood then) of the RP Act were challenged as ultra vires Article 19(1)(*a*). The former provision declared the character assassination of a candidate as a major corrupt practice and the latter provision made an appeal to vote on the ground of caste a minor corrupt practice. The contention that these provisions impinged on the freedom of speech and expression was unhesitatingly rejected. The Court observed that those provisions did not stop a man from speaking. They merely prescribed conditions which must be observed if a citizen wanted to enter Parliament. It was further observed that the right to stand as a candidate and contest an election is a special right created by the statute and can only be exercised on the conditions laid down by the statute. In that context, the Court made an observation that the fundamental right chapter had no bearing on the right to contest the election which is created by the statute and the appellant had no fundamental right to be elected as a Member of Parliament. If a person wants to get elected, he must observe the rules laid down by law. So holding, those sections were held to be *intra vires*. I do not think that this decision which dealt with the contesting candidate's rights and obligations has any bearing on the freedom of expression of the voter and the public in general in the context of elections. The remark that "the fundamental right chapter has no bearing on a right like this created by statute" cannot be divorced from the context in which it was made.

55 AIR 1954 SC 686 : (1955) 1 SCR 608

99. The learned Senior Counsel appearing for one of the interveners (BJP) has advanced the contention that if the right to information is culled out from Article 19(1)(*a*) and read as an integral part of that right, it is fraught with dangerous consequences inasmuch as the grounds of reasonable restrictions which could be imposed are by far limited and therefore, the Government may be constrained to part with certain sensitive informations which would not be in public interest to disclose. This raises the larger question whether apart from the heads of restriction envisaged by sub-article (2) of Article 19, certain inherent limitations should not be read into the article, if it becomes necessary to do so in national or societal interest. The discussion on this aspect finds its echo in the separate opinion of Jeevan Reddy, J. in *Cricket Assn. case*[11]. The learned Judge was of the view that the freedom of speech and expression cannot be so exercised as to endanger the interest of the nation or the interest of the society, even if the expression "national interest" or "public interest" has not been used in Article 19(2). It was pointed out that such implied limitation has been read into the First Amendment of the US Constitution which guarantees the freedom of speech and expression in unqualified terms.

100. The following observations of the US Supreme Court in *Gitlow* v. *New York*[56] are very relevant in this context: (US p. 666)

> "It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language, and prevents the punishment of those who abuse this freedom."

101. Whenever the rare situations of the kind anticipated by the learned counsel arise, the Constitution and the courts are not helpless in checking the misuse and abuse of the freedom. Such a check need not necessarily be found strictly within the confines of Article 19(2).

II. Sections 33-A and 33-B of the Representation of the People (Third Amendment) Act, 2002 — whether Section 33-A by itself effectively secures the voter's/citizen's right to information — whether Section 33-B is unconstitutional

II. (1) Sections 33-A and 33-B of the Representation of the People (Third Amendment) Act

102. Now I turn my attention to the discussion of the core question, that is to say, whether the impugned legislation falls foul of Article 19(1)(*a*) for limiting the area of disclosure and whether Parliament acted beyond its competence in deviating from the directives given by this Court to the Election Commission in *Democratic Reforms Assn. case*[1]. By virtue of the Representation of the People (Third Amendment) Act, 2002 the only information which a prospective contestant is required to furnish apart from the information which he is obliged to disclose under the existing provisions

56 69 L Ed 1138 : 268 US 652 (1925)

is the information on two points: (*i*) whether he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed; and (*ii*) whether he has been convicted of an offence [other than the offence referred to in sub-sections (1) to (3) of Section 8] and sentenced to imprisonment for one year or more. On other points spelt out in this Court's judgment, the candidate is not liable to furnish any information and that is so, notwithstanding anything contained in any judgment or order of a court OR any direction, order or instruction issued by the Election Commission. Omission to furnish the information as per the mandate of Section 33-B and furnishing false information in that behalf is made punishable. That is the sum and substance of the two provisions, namely, Sections 33-A and 33-B.

103. The plain effect of the embargo contained in Section 33-B is to nullify substantially the directives issued by the Election Commission pursuant to the judgment of this Court. At present, the instructions issued by the Election Commission could only operate in respect of the items specified in Section 33-A and nothing more. It is for this reason that Section 33-B has been challenged as ultra vires the Constitution both on the ground that it affects the fundamental right of the voter/citizen to get adequate information about the candidate and that Parliament is incompetent to nullify the judgment of this Court. I shall briefly notice the rival contentions on this crucial issue.

II. (2) Contentions

104. The petitioners' contention is that the legislation on the subject of disclosure of particulars of candidates should adopt in entirety the directives issued by this Court to the Election Commission in the pre-Ordinance period. Any dilution or deviation of those norms or directives would necessarily violate the fundamental right guaranteed by Article 19(1)(*a*) as interpreted by this Court and therefore the law, as enacted by Parliament, infringes the said guarantee. This contention has apparently been accepted by my learned Brother M.B. Shah, J. The other viewpoint presented on behalf of the Union of India and one of the interveners is that the freedom of the legislature in identifying and evolving the specific areas in which such information should be made public cannot be curtailed by reference to the ad hoc directives given by this Court in the pre-Ordinance period and the legislative wisdom of Parliament, especially in election matters, cannot be questioned. This is the position even if the right to know about the candidate is conceded to be part of Article 19(1)(*a*). It is for Parliament to decide to what extent and how far the information should be made available. In any case, it is submitted that the Court's verdict has been duly taken note of by Parliament and certain provisions have been made to promote the right to information vis-à-vis the contesting candidates. Section 33-B is only a part of this exercise and it does not go counter to Article 19(1)(*a*) even though the scope of public disclosures has been limited to one important aspect only.

II. (3) Broad points for consideration

105. A liberal but not a constricted approach in the matter of disclosure of information in relation to candidates seeking election is no doubt a desideratum. The wholesale adoption of the Court's diktats on the various items of information while enacting the legislation would have received public approbation and would have been welcomed by the public. It would have been in tune with the recommendations of various commissions and even the statements made by eminent and responsible political personalities. However, the fact remains that Parliament in its discretion did not go the whole hog, but chose to limiting the scope of mandated disclosures to only one of the important aspects highlighted in the judgment. The question remains to be considered whether in doing so, Parliament outstepped its limits and enacted a law in violation of the guarantee enshrined in Article 19(1)(*a*) of the Constitution. The allied question is whether Parliament has no option but to scrupulously adopt the directives given by this Court to the Election Commission. Is it open to Parliament to independently view the issue and formulate the parameters and contents of disclosure, though it has the effect of diluting or diminishing the scope of disclosures which, in the perception of the Court, were desirable? In considering these questions of far-reaching importance from the constitutional angle, it is necessary to have a clear idea of the ratio and implications of this Court's judgment in *Assn. for Democratic Reforms case*[1].

II. (4) Analysis of the judgment in Assn. for Democratic Reforms case[1]— whether and how far the directives given therein have an impact on the parliamentary legislation — approach of the Court in testing the legislation

106. The first proposition laid down by this Court in the said case is that a citizen/voter has the right to know about the antecedents of the contesting candidate and that right is a part of the fundamental right under Article 19(1)(*a*). In this context, M.B. Shah, J. observed that: [SCC p. 322, para 46(7)]

> "Voter's speech or expression in case of election would include casting of votes, that is to say, *voter speaks out or expresses by casting vote*."

It was then pointed out that the information about the candidate to be selected is essential as it would be conducive to transparency and purity in the process of election. The next question considered was how best to enforce that right. The Court having noticed that there was a void in the field in the sense that it was not covered by any legislative provision, gave directions to the Election Commission to fill the vacuum by requiring the candidate to furnish information on the specified aspects while filing the nomination paper. Five items of information which the Election Commission should call for from the prospective candidates were spelt out by the Court. Two of them relate to criminal background of the candidate and pendency of criminal cases against him. Points 3 and 4 relate to assets and liabilities of the candidate and his/her family. The last one is about the educational qualifications of the candidate.

The legal basis and the justification for issuing such directives to the Commission has been stated thus (vide SCC p. 309, paras 19-20):

> "*19.* At the outset, we would say that it is not possible for this Court to give any directions for amending the Act or the statutory Rules. It is for Parliament to amend the Act and the Rules. It is also established law that no direction can be given, which would be contrary to the Act and the Rules.
>
> *20.* However, it is equally settled that in case when the Act or Rules are silent on a particular subject and the authority implementing the same has constitutional or statutory power to implement it, the Court can necessarily issue directions or orders on the said subject to fill the vacuum or void till the suitable law is enacted."

Again, at para 49 it was emphasized: (SCC p. 322)

> "*49.* It is to be stated that the Election Commission has from time to time issued instructions/orders to meet with the situation where the field is unoccupied by the legislation. Hence, the norms and modalities to carry out and give effect to the aforesaid directions should be drawn up properly by the Election Commission as early as possible...."

107. Thus, the Court was conscious of the fact that the Election Commission could act in the matter only so long as the field is not covered by legislation. The Court also felt that the vacuum or void should be suitably filled so that the right to information concerning a candidate would soon become a reality. In other words, till Parliament applied its mind and came forward with appropriate legislation to give effect to the right available to a voter-citizen, the Court felt that the said goal has to be translated into action through the media of the Election Commission, which is endowed with "residuary power" to regulate the election process in the best interests of the electorate. Instead of leaving it to the Commission and with a view to give quietus to the possible controversies that might arise, the Court considered it expedient to spell out five points (broadly falling into three categories) on which the information has to be called for from the contesting candidate. In the very nature of things, the directives given by the Court were intended to operate only till the law was made by the legislature and in that sense "pro tempore" in nature. The five directives cannot be considered to be rigid theorems — inflexible and immutable — but only reflect the perception and tentative thinking of the Court at a point of time when the legislature did not address itself to the question.

108. When Parliament, in the aftermath of the verdict of this Court, deliberated and thought it fit to secure the right to information to a citizen only to a limited extent (having a bearing on criminal antecedents), a fresh look has to be necessarily taken by the Court and the validity of the law made has to be tested on a clean slate. It must be remembered that the right to get information which is a corollary to the fundamental right to free speech and expression has no fixed connotation. Its contours and parameters cannot be precisely defined and the Court in my understanding, never meant to do so. It

is often a matter of perception and approach. How far to go and where to stop? These are the questions to be pondered over by the legislature and the Constitutional Court called upon to decide the question of validity of the legislation. For instance, many voters/citizens may like to have more complete information — a sort of biodata of the candidate starting from his school days such as his academic career, the properties which he had before and after entering into politics, the details of his income and tax payments for the last one decade and sources of acquisition of his and his family's wealth. Can it be said that all such information which will no doubt enable the voter and public to have a comprehensive idea of the contesting candidate, should be disclosed by a prospective candidate and that the failure to provide for it by law would infringe the fundamental right under Article 19(1)(*a*)? The preponderance of view would be that it is not reasonable to compel a candidate to make disclosures affecting his privacy to that extent in the guise of effectuating the right to information. A line has to be drawn somewhere. While there cannot be a lip service to the valuable right to information, it should not be stretched too far. At the same time, the essence and substratum of the right has to be preserved and promoted, when once it is brought within the fold of fundamental right. A balanced but not a rigid approach, is needed in identifying and defining the parameters of the right which the voter/citizen has. The standards to be applied to disclosures vis-à-vis public affairs and governance AND the disclosures relating to personal life and biodata of a candidate cannot be the same. The measure or yardstick will be somewhat different. It should not be forgotten that the candidates' right to privacy is one of the many factors that could be kept in view, though that right is always subject to overriding public interest.

109. In my view, the points of disclosure spelt out by this Court in *Assn. for Democratic Reforms case*[1] should serve as broad indicators or parameters in enacting the legislation for the purpose of securing the right to information about the candidate. The paradigms set by the Court, though pro tempore in nature as clarified supra, are entitled to due weight. If the legislature in utter disregard of the indicators enunciated by this Court proceeds to make a legislation providing only for a semblance or pittance of information or omits to provide for disclosure on certain essential points, the law would then fail to pass the muster of Article 19(1)(*a*). Though certain amount of deviation from the aspects of disclosure spelt out by this Court is not impermissible, a substantial departure cannot be countenanced. The legislative provision should be such as to promote the right to information to a reasonable extent, if not to the fullest extent on details of concern to the voters and citizens at large. While enacting the legislation, the legislature has to ensure that the fundamental right to know about the candidate is reasonably secured and information which is crucial, by any objective standards, is not denied. It is for the Constitutional Court in exercise of its judicial review power to judge whether the areas of disclosure carved out by the legislature are reasonably adequate to safeguard the citizens' right to information. The Court has to take a holistic view and adopt a balanced approach, keeping in view the twin principles that the citizens' right to information to know about the personal

details of a candidate is not an unlimited right and that at any rate, it has no fixed concept and the legislature has freedom to choose between two reasonable alternatives. It is not a proper approach to test the validity of legislation only from the standpoint whether the legislation implicitly and word to word gives effect to the directives issued by the Court as an ad hoc measure when the field was unoccupied by legislation. Once legislation is made, this Court has to make an independent assessment in the process of evaluating whether the items of information statutorily ordained are reasonably adequate to secure the right of information to the voter so as to facilitate him to form a fairly clear opinion on the merits and demerits of the candidates. In embarking on this exercise, as already stated, this Court's directives on the points of disclosure even if they be tentative or ad hoc in nature, cannot be brushed aside, but should be given due weight. But, I reiterate that the shape of the legislation need not be solely controlled by the directives issued to the Election Commission to meet an ad hoc situation. As I said earlier, the right to information cannot be placed in straitjacket formulae and the perceptions regarding the extent and amplitude of this right are bound to vary.

III. Section 33-B is unconstitutional

III. (1) The right to information cannot be frozen and stagnated

110. In my view, the constitutional validity of Section 33-B has to be judged from the above angle and perspective. Considered in that light, I agree with the conclusion of M.B. Shah, J. that Section 33-B does not pass the test of constitutionality. The reasons are more than one. Firstly, when the right to secure information about a contesting candidate is recognized as an integral part of fundamental right as it ought to be, it follows that its ambit, amplitude and parameters cannot be chained and circumscribed for all times to come by declaring that no information, other than that specifically laid down in the Act, should be required to be given. When the legislation delimiting the areas of disclosure was enacted, it may be that Parliament felt that the disclosure on other aspects was not necessary for the time being. Assuming that the guarantee of right to information is not violated by making a departure from the paradigms set by the Court, it is not open to Parliament to stop all further disclosures concerning the candidate in future. In other words, a blanket ban on dissemination of information other than that spelt out in the enactment, irrespective of the need of the hour and the future exigencies and expedients is, in my view, impermissible. It must be remembered that the concept of freedom of speech and expression does not remain static. The felt necessities of the times coupled with experiences drawn from the past may give rise to the need to insist on additional information on the aspects not provided for by law. New situations and the march of events may demand the flow of additional facets of information. The right to information should be allowed to grow rather than being frozen and stagnated; but the mandate of Section 33-B prefaced by the non obstante clause impedes the flow of such information conducive to the freedom of expression. In the face of the prohibition under Section 33-B, the Election Commission which is entrusted

with the function of monitoring and supervising the election process will have to sit back with a sense of helplessness in spite of the pressing need for insisting on additional information. Even the Court may at times feel handicapped in taking necessary remedial steps to enforce the right to information. In my view, the legislative injunction curtailing the nature of information to be furnished by the contesting candidates only to the specific matters provided for by the legislation and nothing more would emasculate the fundamental right to freedom of expression of which the right to information is a part. The very objective of recognizing the right to information as part of the fundamental right under Article 19(1)(*a*) in order to ensure free and fair elections would be frustrated if the ban prescribed by Section 33-B is taken to its logical effect.

III. (2) Impugned legislation fails to effectuate right to information on certain vital aspects

111. The second reason why Section 33-B should be condemned is that by blocking the ambit of disclosures only to what has been specifically provided for by the amendment, Parliament failed to give effect to one of the vital aspects of information viz. disclosure of assets and liabilities and thus failed in substantial measure to give effect to the right to information as a part of the freedom of expression. The right to information which is now provided for by the legislature no doubt relates to one of the essential points but in ignoring the other essential aspect relating to assets and liabilities as discussed hereinafter, Parliament has unduly restricted the ambit of information which the citizens should have and thereby impinged on the guarantee enshrined in Article 19(1)(*a*).

III. (3) How far the principle that the legislature cannot encroach upon the judicial sphere applies

112. It is a settled principle of constitutional jurisprudence that the only way to render a judicial decision ineffective is to enact a valid law by way of amendment or otherwise fundamentally altering the basis of the judgment either prospectively or retrospectively. The legislature cannot overrule or supersede a judgment of the Court without lawfully removing the defect or infirmity pointed out by the Court because it is obvious that the legislature cannot trench on the judicial power vested in the courts. Relying on this principle, it is contended that the decision of the Apex Constitutional Court cannot be set at naught in the manner in which it has been done by the impugned legislation. As a sequel, it is further contended that the question of altering the basis of judgment or curing the defect does not arise in the instant case as Parliament cannot pass a law in curtailment of fundamental right recognized, amplified and enforced by this Court.

113. The contention that the fundamental basis of the decision in *Assn. for Democratic Reforms case*[1] has not at all been altered by Parliament, does not appeal to me. I have discussed at length the real scope and ratio of the judgment and the nature and character of directives given by this Court to the Election Commission. As observed earlier, those directions are pro tempore in nature when there was a vacuum in the field. When once Parliament

stepped in and passed the legislation providing for right of information, maybe on certain limited aspects, the void must be deemed to have been filled up and the judgment works itself out, though the proposition laid down and observations made in the context of Article 19(1)(*a*) on the need to secure information to the citizens will hold good. Now the new legislation has to be tested on the touchstone of Article 19(1)(*a*). Of course, in doing so, the decision of this Court should be given due weight and there cannot be a marked departure from the items of information considered essential by this Court to effectuate the fundamental right to information. Viewed in this light, it must be held that Parliament did not by law provide for disclosure of information on certain crucial points such as assets and liabilities and at the same time, placed an embargo on calling for further informations by enacting Section 33-B. That is where Section 33-B of the impugned Amendment Act does not pass the muster of Article 19(1)(*a*), as interpreted by this Court.

IV. Right to information with reference to specific aspects

114. I shall now discuss the specifics of the problem. With a view to promote the right to information, this Court gave certain directives to the Election Commission which, as I have already clarified, were ad hoc in nature. The Election Commission was directed to call for details from the contesting candidates broadly on three points, namely, (*i*) criminal record, (*ii*) assets and liabilities, and (*iii*) educational qualification. The Third Amendment to the RP Act which was preceded by an ordinance provided for disclosure of information. How far the Third Amendment to the Representation of the People Act, 2002 safeguards the right of information which is a part of the guaranteed right under Article 19(1)(*a*), is the question to be considered now with specific reference to each of the three points spelt out in the judgment of this Court in *Assn. for Democratic Reforms case*[1].

IV. (1) Criminal background and pending criminal cases against candidates — Section 33-A of the RP (Third Amendment) Act

115. As regards the first aspect, namely, criminal record, the directives in *Assn. for Democratic Reforms case*[1] are twofold: (SCC p. 322, para 48)

> "(*1*) Whether the candidate is convicted/acquitted/discharged of any criminal offence in the past — if any, whether he is punished with imprisonment or fine.
>
> (*2*) Prior to six months of filing of nomination, whether the candidate is an accused in any pending case, of any offence punishable with imprisonment for two years or more, and in which charge is framed or cognizance is taken by the court of law."

As regards the second directive, Parliament has substantially proceeded on the same lines and made it obligatory for the candidate to furnish information as to whether he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the competent court. However, the case in which cognizance has been taken but charge has not been framed is not covered by clause (*i*) of Section 33-

A(I). Parliament having taken the right step of compelling disclosure of the pendency of cases relating to major offences, there is no good reason why it failed to provide for the disclosure of the cases of the same nature of which cognizance has been taken by the Court. It is common knowledge that on account of a variety of reasons such as the delaying tactics of one or the other accused and inadequacies of the prosecuting machinery, framing of formal charges gets delayed considerably, especially in serious cases where committal procedure has to be gone through. On that account, the voter/citizen shall not be denied information regarding cognizance taken by the Court of an offence punishable with imprisonment for two years or more. The citizen's right to information, when once it is recognized to be part of the fundamental right under Article 19(1)(*a*), cannot be truncated in the manner in which it has been done. Clause (*i*) of Section 33-A(I) therefore falls short of the avowed goal to effectuate the right of information on a vital aspect. Cases in which cognizance has been taken should therefore be comprehended within the area of information accessible to the voters/citizens, in addition to what is provided for in clause (*i*) of Section 33-A.

116. Coming to clause (*ii*) of Section 33-A(I), Parliament broadly followed the pattern shown by the Court itself. This Court thought it fit to draw a line between major/serious offences and minor/non-serious offences while giving Direction 2 (vide para 48). If so, the legislative thinking that this distinction should also hold good in regard to past cases cannot be faulted on the ground that the said clause fails to provide adequate information about the candidate. If Parliament felt that the convictions and sentences of the long past relating to petty/non-serious offences need not be made available to the electorate, it cannot be definitely said that the valuable right to information becomes a casualty. Very often, such offences by and large may not involve moral turpitude. It is not uncommon, as one of the learned Senior Counsel pointed out that the political personalities are prosecuted for politically related activities such as holding demonstrations and visited with the punishment of fine or short imprisonment. Information regarding such instances may not be of real importance to the electorate in judging the worth of the relative merits of the candidates. At any rate, it is a matter of perception and balancing of various factors, as observed supra. The legislative judgment cannot be faulted merely for the reason that the pro tempore directions of this Court have not been scrupulously followed. As regards acquittals, it is reasonable to take the view that such information will not be of much relevance inasmuch as acquittal prima facie implies that the accused is not connected with the crime or the prosecution has no legs to stand. It is not reasonable to expect that from the factum of prosecution resulting in acquittal, the voters/citizens would be able to judge the candidate better. On the other hand, such information in general has the potential to send misleading signals about the honesty and integrity of the candidate.

117. I am therefore of the view that as regards past criminal record, what Parliament has provided for is fairly adequate.

118. One more aspect which needs a brief comment is the exclusion of offences referred to in sub-sections (1) and (2) of Section 8 of the RP Act, 1951. Section 8 deals with disqualification on conviction for certain offences. Those offences are of serious nature from the point of view of national and societal interest. Even the existing provisions viz. Rule 4-A inserted by the Conduct of Elections (Amendment) Rules, 2002 makes a provision for disclosure of such offences in the nomination form. Hence, such offences have been excluded from the ambit of clause (*ii*) of Section 33-A.

IV. (2) Assets and liabilities

119. Disclosure of assets and liabilities is another thorny issue. If the right to information is to be meaningful and if it is to serve its avowed purpose, I am of the considered view that the candidate entering the electoral contest should be required to disclose the assets and liabilities (barring articles of household use). A Member of Parliament or State Legislature is an elected representative occupying high public office and at the same time, he is a "public servant" within the meaning of the Prevention of Corruption Act as ruled by this Court in the case of *P.V. Narasimha Rao* v. *State*[46]. They are the repositories of public trust. They have public duties to perform. It is borne out by experience that by virtue of the office they hold there is a real potential for misuse. The public awareness of financial position of the candidate will go a long way in forming an opinion whether the candidate, after election to the office had amassed wealth either in his own name or in the name of family members viz. spouse and dependent children. At the time when the candidate seeks re-election, the citizens/voters can have a comparative idea of the assets before and after the election so as to assess whether the high public office had possibly been used for self-aggrandizement. Incidentally, the disclosure will serve as a check against misuse of power for making quick money, a malady which nobody can deny, has been pervading the political spectrum of our democratic nation. As regards liabilities, the disclosure will enable the voter to know, inter alia, whether the candidate has outstanding dues payable to public financial institutions or the Government. Such information has a relevant bearing on the antecedents and the propensities of the candidate in his dealings with public money. "Assets and liabilities" is one of the important aspects to which extensive reference has been made in *Assn. for Democratic Reforms case*[1]. The Court did consider it, after an elaborate discussion, as a vital piece of information as far as the voter is concerned. But, unfortunately, the observations made by this Court in this regard have a been given a short shrift by Parliament with little realization that they have a significant bearing on the right to get information from the contesting candidates and such information is necessary to give effect to the freedom of expression.

120. As regards the purpose of disclosure of assets and liabilities, I would like to make it clear that it is not meant to evaluate whether the candidate is financially sound or has sufficient money to spend in the election. Poor or rich are alike entitled to contest the election. Every citizen has equal accessibility in the public arena. If the information is meant to mobilize

public opinion in favour of an affluent/financially sound candidate, the tenet of socialistic democracy and the concept of equality so firmly embedded in our Constitution will be distorted. I cannot also share the view that this information on assets would enable the public to verify whether unaccounted money played a part in contesting the election. So long as Explanation 1 to Section 77 of the RP Act, 1951 stands and the contributions can legitimately come from any source, it is not possible for a citizen/voter to cause a verification to be made on those lines. In my opinion, the real purposes of seeking information in regard to assets and liabilities are those which I adverted to in the preceding paragraph. It may serve other purposes also, but, I have confined myself to the relevancy of such disclosure vis-à-vis right to information only.

121. It has been contended with much force that the right to information made available to the voters/citizens by judicial interpretation has to be balanced with the right of privacy of the spouse of the contesting candidate and any insistence on the disclosure of assets and liabilities of the spouse invades his/her right to privacy which is implied in Article 21. After giving anxious consideration to this argument, I am unable to uphold the same. In this context, I would like to recall the apt words of Mathew, J., in *Gobind* v. *State of M.P.*[23] While analysing the right to privacy as an ingredient of Article 21, it was observed: (SCC p. 155, para 22)

> "22. There can be no doubt that privacy-dignity claims deserve to be examined with care and to be denied only when an *important countervailing interest is shown to be superior*." (emphasis supplied)

It was then said succinctly: (SCC pp. 155-56, para 22)

> "If the court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling State-interest test. Then the question would be whether a State interest is of such paramount importance as would justify an infringement of the right."

It was further explained: (SCC p. 156, para 23)

> "[P]rivacy primarily concerns the individual. It therefore relates to and overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values."

By calling upon the contesting candidate to disclose the assets and liabilities of his/her spouse, the fundamental right to information of a voter/citizen is thereby promoted. When there is a competition between the right to privacy of an individual and the right to information of the citizens, the former right has to be subordinated to the latter right as it serves the larger public interest. The right to know about the candidate who intends to become a public figure and a representative of the people would not be effective and real if only truncated information of the assets and liabilities is given. It cannot be denied that the family relationship and social order in our country is such that the

husband and wife look to the properties held by them as belonging to the family for all practical purposes, though in the eye of law the properties may distinctly belong to each of them. By and large, there exists a sort of unity of interest in the properties held by spouses. The property being kept in the name of the spouse *benami* is not unknown in our country. In this situation, it could be said that a countervailing or paramount interest is involved in requiring a candidate who chooses to subject himself/herself to public gaze and scrutiny to furnish the details of assets and liabilities of the spouse as well. That is one way of looking at the problem. More important, it is to be noted that Parliament itself accepted in principle that not only the assets of the elected candidates but also his or her spouse and dependent children should be disclosed to the constitutional authority and the right of privacy should not come in the way of such disclosure; but, the hitch lies in the fact that the disclosure has to be made to the Speaker or Chairman of the House after he or she is elected. No provision has been made for giving access to the details filed with the presiding officer of the House. By doing so, Parliament has omitted to give effect to the principle, which it rightly accepted as a step in aid to promote integrity in public life. Having accepted the need to insist on disclosure of assets and liabilities of the elected candidate together with those of other family members, Parliament refrained from making a provision for furnishing the information at the time of filing the nomination. This has resulted in jeopardizing the right to information implicitly guaranteed by Article 19(1)(*a*). Therefore, the provision made in Section 75-A regarding declaration of assets and liabilities of the elected candidates to the presiding officer has failed to effectuate the right to information and the freedom of expression of the voters/citizens.

IV. (3) Educational qualifications

122. The last item left for discussion is about educational qualifications. In my view, the disclosure of information regarding educational qualifications of a candidate is not an essential component of the right to information flowing from Article 19(1)(*a*). By not providing for disclosure of educational qualifications, it cannot be said that Parliament violated the guarantee of Article 19(1)(*a*). Consistent with the principle of adult suffrage, the Constitution has not prescribed any educational qualification for being Member of the House of the People or Legislative Assembly. That apart, I am inclined to think that the information relating to educational qualifications of contesting candidates does not serve any useful purpose in the present context and scenario. It is a well-known fact that barring a few exceptions, most of the candidates elected to Parliament or the State Legislatures are fairly educated even if they are not graduates or postgraduates. To think of illiterate candidates is based on a factually incorrect assumption. To say that well-educated persons such as those having graduate and postgraduate qualifications will be able to serve the people better and conduct themselves in a better way inside and outside the House is nothing but overlooking the stark realities. The experience and events in public life and the legislatures

have demonstrated that the dividing line between the well educated and less educated from the point of view of his/her calibre and culture is rather thin. Much depends on the character of the individual, the sense of devotion to duty and the sense of concern to the welfare of the people. These characteristics are not the monopoly of well-educated persons. I do not think that it is necessary to supply information to the voter to facilitate him to indulge in an infructuous exercise of comparing the educational qualifications of the candidates. It may be that certain candidates having exceptionally high qualifications in specialized field may prove useful to the society, but it is natural to expect that such candidates would voluntarily come forward with an account of their own academic and other talents as a part of their election programme. Viewed from any angle, the information regarding educational qualifications is not a vital and useful piece of information to the voter, in ultimate analysis. At any rate, two views are reasonably possible. Therefore, it is not possible to hold that Parliament should have necessarily made the provision for disclosure of information regarding educational qualifications of the candidates.

V. Conclusions

123. Finally, the summary of my conclusions:

(*1*) Securing information on the basic details concerning the candidates contesting for elections to Parliament or the State Legislature promotes freedom of expression and therefore the right to information forms an integral part of Article 19(1)(*a*). This right to information is, however, qualitatively different from the right to get information about public affairs or the right to receive information through the press and electronic media, though, to a certain extent, there may be overlapping.

(*2*) The right to vote at the elections to the House of the People or Legislative Assembly is a constitutional right but not merely a statutory right; freedom of voting as distinct from right to vote is a facet of the fundamental right enshrined in Article 19(1)(*a*). The casting of vote in favour of one or the other candidate marks the accomplishment of freedom of expression of the voter.

(*3*) The directives given by this Court in *Union of India* v. *Assn. for Democratic Reforms*[1] were intended to operate only till the law was made by the legislature and in that sense "pro tempore" in nature. Once legislation is made, the Court has to make an independent assessment in order to evaluate whether the items of information statutorily ordained are reasonably adequate to secure the right of information available to the voter/citizen. In embarking on this exercise, the points of disclosure indicated by this Court, even if they be tentative or ad hoc in nature, should be given due weight and substantial departure therefrom cannot be countenanced.

(*4*) The Court has to take a holistic view and adopt a balanced approach in examining the legislation providing for right to information and laying down the parameters of that right.

(*5*) Section 33-B inserted by the Representation of the People (Third Amendment) Act, 2002 does not pass the test of constitutionality, firstly, for the reason that it imposes a blanket ban on dissemination of information other than that spelt out in the enactment irrespective of the need of the hour and the future exigencies and expedients and secondly, for the reason that the ban operates despite the fact that the disclosure of information now provided for is deficient and inadequate.

(*6*) The right to information provided for by Parliament under Section 33-A in regard to the pending criminal cases and past involvement in such cases is reasonably adequate to safeguard the right to information vested in the voter/citizen. However, there is no good reason for excluding the pending cases in which cognizance has been taken by the Court from the ambit of disclosure.

(*7*) The provision made in Section 75-A regarding declaration of assets and liabilities of the elected candidates to the Speaker or the Chairman of the House has failed to effectuate the right to information and the freedom of expression of the voters/citizens. Having accepted the need to insist on disclosure of assets and liabilities of the elected candidate together with those of the spouse or dependent children, Parliament ought to have made a provision for furnishing this information at the time of filing the nomination. Failure to do so has resulted in the violation of guarantee under Article 19(1)(*a*).

(*8*) The failure to provide for disclosure of educational qualification does not, in practical terms, infringe the freedom of expression.

(*9*) The Election Commission has to issue revised instructions to ensure implementation of Section 33-A subject to what is laid down in this judgment regarding the cases in which cognizance has been taken. The Election Commission's orders related to disclosure of assets and liabilities will still hold good and continue to be operative. However, Direction 4 of para 14 insofar as verification of assets and liabilities by means of summary enquiry and rejection of nomination paper on the ground of furnishing wrong information or suppressing material information should not be enforced.

124. Accordingly, the writ petitions stand disposed of without costs.

DHARMADHIKARI, J.— I have carefully gone through the well-considered separate opinions of Brothers M.B. Shah and P.V. Reddi, JJ. Both the learned Judges have come to a common conclusion that Section 33-B inserted in the Representation of the People Act, 1951 by Amendment Ordinance 4 of 2002, which on repeal is succeeded by the Third Amendment Act of 2002, is liable to be declared invalid being violative of Article 19(1)(*a*) of the Constitution.

126. I am in respectful agreement with the above conclusion reached in common by both the learned Brothers. I would, however, like to supplement the above conclusion.

127. The reports of the advisory commissions set up one after the other by the Government to which a reference has been made by Brother Shah, J., highlight the present political scenario where money power and muscle power have substantially polluted and perverted the democratic processes in India. To control the ill-effects of money power and muscle power the commissions recommend that election system should be overhauled and drastically changed lest democracy would become a teasing illusion to common citizens of this country. Not only a half-hearted attempt in the direction of reform of the election system is to be taken, as has been done by the present legislation by amending some provisions of the Act here and there, but a much improved election system is required to be evolved to make the election process both transparent and accountable so that influence of tainted money and physical force of criminals do not make democracy a farce — the citizen's fundamental "right to information" should be recognised and fully effectuated. This freedom of a citizen to participate and choose a candidate at an election is distinct from exercise of his right as a voter which is to be regulated by statutory law on the election like the RP Act.

128. Making of law for election reform is undoubtedly a subject exclusively of the legislature. Based on the decision of this Court in the case of *Assn. for Democratic Reforms*[1] and the directions made therein to the Election Commission, the Amendment Act under consideration has made an attempt to fill the void in law but the void has not been filled fully and does not satisfy the requirements for exercise of fundamental freedom of the citizen to participate in election as a well-informed voter.

129. Democracy based on "free and fair elections" is considered as a basic feature of the Constitution in the case of *Kesavananda Bharati*[4]. Lack of adequate legislative will to fill the vacuum in law for reforming the election process in accordance with the law declared by this Court in the case of *Assn. for Democratic Reforms*[1] obligates this Court as an important organ in constitutional process to intervene.

130. In my opinion, this Court is obliged by the Constitution to intervene because the legislative field, even after the passing of the Ordinance and the Amendment Act, leaves a vacuum. This Court in the case of *Assn. for Democratic Reforms*[1] has determined the ambit of fundamental "right of information" to a voter. The law, as it stands today after amendment, is deficient in ensuring "free and fair elections". This Court has, therefore, found it necessary to strike down Section 33-B of the Amendment Act so as to revive the law declared by this Court in the case of *Assn. for Democratic Reforms*[1].

131. With these words, I agree with Conclusions (*A*) to (*E*) in the opinion of Brother Shah, J. and Conclusions (*1*), (*2*), (*4*), (*5*), (*6*), (*7*) and (*9*) in the opinion of Brother P.V. Reddi, J.

132. With utmost respect, I am unable to agree with Conclusions (*3*) and (*8*) in the opinion of Brother P.V. Reddi, J., as on those aspects, I have expressed my respectful agreement with Brother Shah, J.